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## Unpacking the Household: Informal Property Rights Around the Hearth

**ABSTRACT.** As Aristotle recognized in *The Politics*, the household is an indispensable building block of social, economic, and political life. A liberal society grants its citizens far wider berth to arrange their households than to choose their familial and marital relationships. Legal commentators, however, have devoted far more attention to the family and to marriage than to the household as such. To unpack the household, this Article applies transaction cost economics and sociological theory to interactions among household participants. It explores questions such as the structure of ownership of dwelling units, the scope of household production, and the governance of activities around the hearth. Drawing on a wide variety of historical and statistical sources, the Article contrasts conventional family-based households with arrangements in, among others, medieval English castles, Benedictine monasteries, and Israeli kibbutzim.

A household is likely to involve several participants and as many as three distinct relationships—that among occupants, that among owners, and that between these two groups (the landlord-tenant relationship). Individuals, when structuring these home relationships, typically pursue a strategy of consorting with intimates. This facilitates informal coordination and greatly reduces the transaction costs of domestic interactions. Utopian critics, however, have sought to enlarge the scale of households, and some legal advocates have urged household members to write formal contracts and take disputes into court. These commentators fail to appreciate the great advantages, in the home setting, of informally associating with a few trustworthy intimates.

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## INTRODUCTION

Lawyers and legal scholars understandably tend to focus on domains of life where law is central. There is much to be learned, however, from domains where people deliberately structure their affairs to minimize formalities such as written contracts and legal entanglements. Just as studying conditions of anarchy helps illuminate the effects of government, so studying domains that people intentionally keep casual can shed light on the merits of more legalized arrangements.

This Article analyzes one of the most important human institutions in which informality traditionally has prevailed: the household. Although the household lies at the core of everyday life, economists and legal scholars have yet to give it the attention it deserves.<sup>1</sup> The members of a household (that is, its owners and occupants) together manage a real estate enterprise that makes use of inputs of land, capital, and labor in order to provide shelter, meals, and other services. Members of an intimate household, through their repeated interactions, typically generate a set of norms to govern their behavior, including their duties to supply household inputs and their rights to share in household outputs. The chief goals of this Article are to provide a structure for thinking about the household, to systematize and augment what is already known, and to stimulate legal scholars and other analysts to devote more attention to the structuring of the home.<sup>2</sup>

It is important at the outset to distinguish the household from both marriage and the family, two closely related (and much more studied) social molecules with which it commonly is conflated. As just suggested, a

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1. Most scholars who have analyzed households have focused exclusively on marital or premarital households, a tip-off that their main interest is the marital relationship. See, e.g., Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies To Remedy the Gender Gap*, 82 GEO. L.J. 89 (1993). The leading law review analysis of intimate communities of all kinds, Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001), deals only with relations among co-owners and attempts no systematic analysis of the household as such. Works close in spirit to the present one include MARGARET G. REID, *ECONOMICS OF HOUSEHOLD PRODUCTION* (1934), Yoram Ben-Porath, *The F-Connection: Families, Friends, and Firms and the Organization of Exchange*, 6 POPULATION & DEV. REV. 1 (1980), David D. Haddock & Daniel D. Polsby, *Family as a Rational Classification*, 74 WASH. U. L.Q. 15 (1996), and Robert A. Pollak, *A Transaction Cost Approach to Families and Households*, 23 J. ECON. LITERATURE 581, 588-89 (1985). Pollak distinguishes families from households but makes limited use of the distinction. For my own preliminary thoughts on the subject, see Robert C. Ellickson, *Norms of the Household*, in *NORMS AND THE LAW* 59 (John N. Drobak ed., 2006).
  2. Much of the analysis to be offered here could be applied to other forms of real estate co-owned and co-occupied by intimates, such as family farms and mom-and-pop retail outlets.

“household” is a set of institutional arrangements, formal or informal, that governs relations among the owners and occupants of a dwelling space where occupants usually sleep and share meals.<sup>3</sup> By this definition, a studio apartment with a single owner-occupant is a household, and so is a kibbutz where hundreds of members dine communally. A study of the household thus is an investigation into the allocation of property rights in a specific physical setting.

“Marriage,” by contrast, denotes a legal relationship between two people that is not specific to any one location. Of course, when marital partners cohabit a home they jointly own, their household relationships are deeply intertwined with their marital relationship. The domain of their marital relationship, however, differs significantly from the domain of their household relationship. Much of marital property law addresses entitlements to assets other than the marital home—to children, financial accounts, and the spouses’ human capital, for example. In that sense, a marital relationship is broader and more multifaceted than a household relationship. Conversely, marital law is unlikely to directly govern some important household relationships. First, when marriage partners cohabit, other kinfolk and non-kinfolk commonly are present in their home. In the United States in 2004, for example, married couples were the sole occupants of less than 39% of multiperson households.<sup>4</sup> Second, a married couple need not cohabit. Indeed, in the United States roughly 7% of married persons do not live with their spouses.<sup>5</sup> Third, marriage

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3. In this Article a “household” thus is distinguished from the dwelling unit occupied (the “house” or “apartment”) and also is regarded as an institution that potentially has participants in addition to those who regularly reside there. The U.S. Census Bureau, by contrast, equates a household with its occupants: “A ‘household’ comprises all persons who occupy a ‘housing unit,’ that is, a house, an apartment or other group of rooms, or a single room that constitutes ‘separate living quarters.’” U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1999, at 6 (1999) [hereinafter STATISTICAL ABSTRACT: 1999]. The Bureau in turn defines a “housing unit” as a room or rooms lived in by persons who do not live and eat with any other occupants of the same structure (and thus, by implication, who do often live and eat with one another). *Id.* at 718. The Bureau defines a “family” as a set of persons related by birth, marriage, or adoption who live together in the same housing unit. *Id.* at 6. It uses “group quarters” to describe the residences of persons in dormitories, jails, nursing homes, military barracks, and the like. *Id.* (On group quarters, see *infra* note 90 and text accompanying notes 116–118.) The Bureau’s definitions do not include a term that encompasses both the owners and occupants of a dwelling unit. In this Article, these participants occasionally are collectively referred to as “members.”
  4. Calculated from data presented in U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, at 51 tbl.53 (2005) [hereinafter STATISTICAL ABSTRACT: 2006]. This is the percentage of multiperson households that included a married couple but no child of that couple under age eighteen.
  5. In 1998, 110.6 million married Americans were living with their spouses, but 7.3 million were not. STATISTICAL ABSTRACT: 1999, *supra* note 3, at 60 tbl.69.

partners who cohabit are not necessarily also the co-owners of their dwelling unit; others may join them as co-owners, they may lease their dwelling from others, or their home may be owned by only one partner. Marital law, in sum, fails to cover significant household relationships. To emphasize the institutional distinction between marriage and the household, much of the discussion to come features relationships within nonmarital households.

“Family” denotes a kinship relationship by blood, adoption, or marriage, but not necessarily a household relationship. Family members, even more obviously than spouses, need neither cohabit nor co-own, and cohabitants and co-owners need not be kin. In the United States, the number of multiperson households in which none of the occupants shared family ties increased almost sixfold between 1970 and 2004.<sup>6</sup> These nonfamilial households, which contained 12.3 million people in 1998,<sup>7</sup> appear in a wide variety of incarnations—for example, university students or young professionals living together as roommates, unmarried heterosexual partners,<sup>8</sup> gay and lesbian couples,<sup>9</sup> welfare recipients or recent immigrants clustering to economize on rent,<sup>10</sup> and idealists teaming up in a commune.

The household is eminently worthy of study as an institution distinct from marriage and the family. Even in industrialized nations, households are still the sites of a large fraction of economic and social activity. In 1985, according to a leading study, American women, irrespective of their marital and employment status, were spending an average of 30.9 hours a week on housework, while men were spending 15.7 hours.<sup>11</sup> In the United States, recent estimates of the

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6. These households increased in number from 1.1 million in 1970, *id.* at 60 tbl.70, to 6.2 million in 2004, STATISTICAL ABSTRACT: 2006, *supra* note 4, at 51 tbl.53.
  7. Calculated from data presented in STATISTICAL ABSTRACT: 1999, *supra* note 3, at 61 tbl.72. See also *infra* text accompanying notes 95-99, 115-122.
  8. In 2000, self-identified unmarried cohabiting opposite-sex partners headed 4.9 million households. TAVI SIMMONS & MARTIN O'CONNELL, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 2 tbl.1 (2003). See generally LYNNE M. CASPER & SUZANNE M. BIANCHI, CONTINUITY AND CHANGE IN THE AMERICAN FAMILY 39-66 (2002) (discussing cohabitation arrangements).
  9. The Census Bureau tallied 594,391 self-identified same-sex partner households in 2000. SIMMONS & O'CONNELL, *supra* note 8, at 2 tbl.1. See generally M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 142-51 (2001) (discussing economic studies of cohabitation and the formation of families among same-sex couples).
  10. See KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 54-56 (1997).
  11. JOHN P. ROBINSON & GEOFFREY GODBEY, TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME 100, 105 (1997) (reporting data from time diaries). Other studies, however, report fewer hours for both sexes. See Margaret F. Brinig, *The Influence of Marvin v. Marvin*

value of within-household production (most of it unpaid) have run from 24% to 60% of GDP—that is, to several trillions of dollars per year.<sup>12</sup>

The norms that govern household affairs, moreover, have had Promethean influence. The rules that our ancestors developed to resolve problems arising around their hearths provided templates for achieving mutually advantageous solutions in settings outside the home.<sup>13</sup> Even today it is typically within the household that children first learn how to recognize and deal with problems posed by common property and collective enterprise. Study of the household therefore promises to shed light on the origins of more complex institutions.

While legal scholars and institutional economists have largely neglected the household as such, numerous demographers, sociologists, and social historians have examined the institution. Aristotle devoted the first book of *The Politics* to analysis of the household, which he envisioned as the basic building block of political life.<sup>14</sup> Plato, Thomas More, Charles Fourier, B.F. Skinner, and other utopian thinkers have imagined new institutional arrangements for providing housing and meals. There have been incessant experiments with unconventional households, such as monasteries, kibbutzim, and, more recently, co-housing developments that enable nuclear households to engage in congregate dining several times a week.

Basic questions about the nature of household institutions abound. Why are the occupants (and also, for that matter, the owners) of a dwelling unit so often related by kinship? Why has the average number of occupants per household fallen, particularly during the twentieth century? More fundamentally (and to redirect questions Ronald Coase famously asked in another context), why don't all adults live alone? Or, conversely, all in one huge household?<sup>15</sup> How do household members obtain the rules that govern

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on *Housework During Marriage*, 76 NOTRE DAME L. REV. 1311, 1340 (2001) (reporting data from 1988). Men's and women's hours of housework became less unequal between 1965 and 1985, primarily because women's hours fell. ROBINSON & GODBEY, *supra*, at 105.

12. See EUSTON QUAH, *ECONOMICS AND HOME PRODUCTION: THEORY AND MEASUREMENT* 80-89 (1993) (reviewing the literature). Most estimates fall in the lower part of the range mentioned in the text. See also *infra* note 236.
13. On this evolution, see MARSHALL SAHLINS, *STONE AGE ECONOMICS* 41-148 (1972), which discusses the "domestic mode of production" in preliterate societies.
14. Aristotle saw the household (*oikos*) as the basic component of, first, the village, and, beyond that, the city (*polis*). ARISTOTLE, *THE POLITICS* 9-10 (Ernest Barker trans., R.F. Stalley rev. trans., Oxford Univ. Press 1995) (c. 335-322 B.C.E.). Although *oikos* is the etymological root of "economics," until recent decades few economists have paid more than passing attention to home economics.
15. R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 388, 394-95 (1937) (discussing the boundaries of a business enterprise).

their relationships, and what sorts of rules are they likely to favor? This Article offers tentative answers to these questions. Although cultural variables also unquestionably affect how individuals set up households, the focus here is on the influence of economic considerations.<sup>16</sup> The overarching thesis is that individuals, across cultures and historical eras, have tended to structure their households, even ones sustained by love and affection, with a close eye to reducing the transaction costs of their domestic interactions.<sup>17</sup>

Part I begins by unpacking the three distinct relationships—co-occupancy, co-ownership, and landlord-tenant—that may exist within a household. It then introduces the notion of the “liberal household,” that is, the sort of institution likely to emerge when background principles of law and norms generally support individual rights of self-determination. Part II offers reasons why individuals in a liberal society, when they form household relationships, are likely to choose to consort with intimates. This strategy, among its other virtues, enables household participants to coordinate informally and relatively cheaply. Part III, the empirical heart of the Article, marshals demographic evidence about household forms and demonstrates the wide popularity, in each of the three basic household relationships, of the strategy of consorting with intimates. Although much of the proffered evidence pertains to contemporary conditions in the United States, some attention is paid here and elsewhere in the Article to households in other nations and other time periods. Part IV raises the issue of the optimality of the process of household formation and reviews utopians’ proposals for radical transformation of conventional household forms. Parts V and VI bring the theory of business enterprise to bear on the issue of the ownership of a household and on the determinants of the number of participants in household relationships.<sup>18</sup> Like participants in a business

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16. Sociologists have adduced statistical evidence that both economic and cultural variables affect the nature of household institutions within the United States. See, e.g., Evelyn Nakano Glenn, *Split Household, Small Producer and Dual Wage Earner: An Analysis of Chinese-American Family Strategies*, 45 J. MARRIAGE & FAM. 35 (1983); Marta Tienda & Ronald Angel, *Headship and Household Composition Among Blacks, Hispanics, and Other Whites*, 61 SOC. FORCES 508 (1982). There is a massive literature on cultural differences in household institutions, including iconic works such as E. FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* (rev. & abr. ed. 1948). Also see *infra* note 84 and the sources on households in other nations cited *infra* notes 93, 99, 105-109, 113-114. On the effects of varying cultural beliefs on the evolution of medieval trading institutions among the Maghribis and Genoese, see AVNER GREIF, *INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY* 269-301 (2006).

17. On the pervasive influence of love and unconditional giving in many household relationships, see *infra* notes 66, 166, 206, 304.

18. Cf. MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* 83-139 (2000) (analyzing “the family as firm”).



firm, members of a household typically confer ownership on providers of at-risk capital, not on occupants who labor within the home. Particularly when some or all of the owners of a dwelling are absentees, this may give rise to the separation of ownership from control—a homespun version of a problem much analyzed in the business context.<sup>19</sup> Part VII investigates alternative processes of internal household governance, including law, norms, and contracts. A central claim is that, in a liberal society, while law provides essential background rules that enable household formation, small-bore private law rules have little relevance to everyday domestic affairs. Instead of looking to the legal system, intimate co-occupants and co-owners are able to coordinate mainly by means of gift exchange, a process that gives rise to household-specific norms. Indeed, even a tenant and an absentee landlord are likely to strive to avoid involvements with the legal system. Part VIII identifies avenues for further research.

## I. HOUSEHOLD FORMATION AND DISSOLUTION IN A LIBERAL SOCIETY

### A. *Three Distinct Relationships That May Exist Within a Household*

When a recluse solely owns and occupies a dwelling unit, interpersonal conflicts within that household are avoided. Difficulties can arise, however, when two or more co-occupants face the task of managing a shared domestic space. Indeed, the seeds of conflict in such circumstances are so fertile that writers of novels, dramas, and television comedies commonly favor story lines that feature the cohabitants of households.<sup>20</sup>

Besides the occupancy dimension, however, there is an ownership dimension to household organization. This can introduce two additional sources of relational complexity: there may be multiple owners of the occupied real estate, and some or all of them may not be occupants. In short, the members of a household may need to manage as many as three conceptually distinct relationships—that among co-occupants, that among co-owners, and

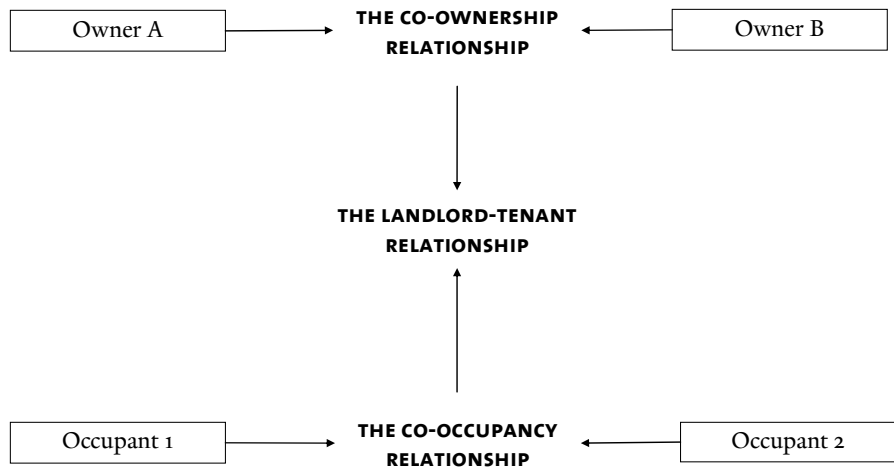
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19. The classic analysis is ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

20. It is notable that many leading television series have been set in multi-occupant households. While many of these have featured married couples, see, e.g., *I Love Lucy* (CBS television broadcast 1951-1957); *The Cosby Show* (NBC television broadcast 1984-1992); *The Sopranos* (HBO television broadcast 1999-present), in some, the principal housemates have not been related, see, e.g., *The Odd Couple* (ABC television broadcast 1970-1975); *Three's Company* (ABC television broadcast 1977-1984); *Friends* (NBC television broadcast 1994-2004).

that between owners and occupants (more familiarly, landlords and tenants). Figure 1 portrays these three spheres of interaction. (As noted, overlapping marital and familial relationships commonly complicate the picture even further.) A study of the household that fails to recognize these distinctions risks muddying its portrayal of domestic life. The U.S. Census Bureau, for example, treats a household’s occupants as its only members.<sup>21</sup> By contrast, Hanoch Dagan and Michael Heller, in their influential article on the “liberal commons,” treat co-owners as the only relevant “commoners.”<sup>22</sup> A household has both occupants and owners, however, and it is essential to consider the roles of each.<sup>23</sup>

Figure 1.  
THE THREE RELATIONSHIPS EMBEDDED WITHIN A COMPLEX HOUSEHOLD



To highlight the distinctions just offered, it is useful to introduce a hypothetical household of greater than usual complexity. Because the relationships within it are rich enough to provide weekly comedy fare, I will refer to it as the “Sitcom Household.” This household has five occupants: Dad,

21. See *supra* note 3.  
22. Dagan & Heller, *supra* note 1, at 552-53, 609-10.  
23. Leading works on families, households, and domestic communities typically fail to distinguish between the roles of occupants and owners. See, e.g., GARY S. BECKER, A TREATISE ON THE FAMILY (enlarged ed. 1991); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1998); BENJAMIN ZABLOCKI, ALIENATION AND CHARISMA: A STUDY OF CONTEMPORARY AMERICAN COMMUNES 45-46 (1980) (discussing “members” of communes).

a widower; Granny, Dad's widowed octogenarian mother; Maureen, Dad's thirty-five-year-old divorced daughter; Chip, Maureen's seven-year-old son; and Nadia, a twenty-two-year-old from abroad whom Maureen has hired to serve as a live-in nanny for Chip. They reside together in a large single-family dwelling, with Nadia in guest quarters situated over the house's attached garage. These five occupants provide virtually all household labor and consume virtually all household services. The ownership of the Sitcom House, however, complicates the structure of relations within it. Dad owns the house in equal shares with his sister, Aunt Audrey. After Dad's wife died a decade ago, Aunt Audrey and he acquired the house, each providing half of the down payment and taking title as tenants in common. Aunt Audrey resided in the Sitcom House for several years, but a few months ago she married, and she now lives elsewhere with her new husband.

The Sitcom Household illustrates the often distinct governance structures of marriages, families, and households. Aunt Audrey, the co-owner with Dad, is the only member of the *dramatis personae* with an ongoing marriage, but her marriage is not nested within the Sitcom Household because she doesn't reside there and her husband is in no way involved. Family relationships abound, but one resident (Nadia the nanny) isn't a family member. Some family members (Granny, Maureen, and Chip), meanwhile, are occupants but not owners, and Aunt Audrey is an owner but not an occupant. This household illustrates the three distinct types of internal relationships, each with its own potential for cooperation or strife: the relationship among the five co-occupants, who must govern their commons; the relationship between the two co-owners, who must govern their joint investment; and the relationship between the co-owner group and co-occupant group, both of whom must govern their landlord-tenant relationship. Note that only one of the members, Dad, is enmeshed in all of these relationships and that he is involved on both ends of the landlord-tenant relationship.

*B. Foundational Liberal Rights That Enable Individuals To Fashion Their Own Households*

People can be thrust into household relationships that they would never voluntarily choose. A totalitarian state might dictate the combinations of participants in all household relationships and also closely regulate the internal practices of households. In *Utopia*, Thomas More envisioned a highly regimented system of this sort.<sup>24</sup> For many decades after it had abolished

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24. THOMAS MORE, *UTOPIA* (George M. Logan & Robert M. Adams eds., Cambridge Univ. Press 1989) (1516); see *infra* note 146 and accompanying text.

private property in land, the Soviet Union assigned families and individuals to specific dwelling units. In some situations, Soviet authorities compelled unacquainted persons or families to share an abode (the much-reviled *komunalkas*).<sup>25</sup> Slave-owners similarly were able to dictate where their slaves resided. In many societies, parents still arrange their children's marriages and thus, in practice, at least one of each child's housemates.

In a liberal state, by contrast, laws and norms support a laissez-faire approach to household formation and dissolution. The core tenet of liberalism is that a competent adult presumptively can decide better than a state, master, parent, or other third party what arrangements best suit that individual. A liberal state therefore largely contents itself with establishing a set of background rules that grant individuals broad discretion to structure their own living arrangements.<sup>26</sup> These background liberal laws typically grow out of, and are buttressed by, entrenched social norms. In this permissive environment, "liberal households"—the ones familiar to most readers—emerge.<sup>27</sup>

The key entitlements necessary for a robust system of decentralized household formation are largely the same as those that underpin a market economy: private ownership of the basic inputs of household production (i.e., land, labor, and capital); freedom of exit from any sort of household relationship; and freedom of contract. Ordinary individuals, who lack the time and interest to obtain detailed legal information, commonly subscribe to the simplified conceptions of basic liberal entitlements that are embedded in prevailing social norms.

### 1. *Private Property*

Members of a liberal household combine land, capital, and labor to generate a flow of domestic goods and services. A liberal system of household formation thus presupposes private property in all three of these basic inputs. An unalloyed private property regime of course can have harsh distributive consequences. Those who lack land, capital, and valued labor skills need

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25. On *komunalkas*, see Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 650-58 (1998); and Michael Wines, *Tight Space. No Privacy. Soviet Décor.*, N.Y. TIMES, Feb. 5, 2000, at A1.

26. See *infra* text accompanying notes 154-160 (noting some exceptions).

27. William Booth coined this useful phrase in WILLIAM JAMES BOOTH, *HOUSEHOLDS: ON THE MORAL ARCHITECTURE OF THE ECONOMY* 95-176 (1993).

assistance from others to have meaningful choices among household arrangements.<sup>28</sup>

A system of private property in land provides havens where household members potentially may fashion their own domestic arrangements. In a society such as the United States, where the supply of private housing and building lots traditionally has been highly competitive, prospective household members can choose, subject to their budget constraints, among a wide range of locations, dwelling types, and tenure arrangements.<sup>29</sup> Conversely, in a society where a few government agencies or private firms control housing supply, or where land use regulations severely limit housing options, there is less freedom in household formation. One of the fundamental entitlements of a private landowner is the right to exclude.<sup>30</sup> This liberal entitlement makes the owners of dwelling units the gatekeepers who control the identities of both occupants and additional owners.<sup>31</sup> Maureen can neither arrange for her lover

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28. On a given night in the United States, roughly one person out of 2000 is among the unsheltered homeless, that is, sleeps in a space not designed for residential use. See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1192 nn.132-33, 1193 n.134 (1996). In the United States, as in other liberal societies, the administrators of a multitude of private and public transfer programs strive, with mixed success, to augment the choices of the destitute. See *id.* at 1189-91 (describing trends in aid to the homeless).
  29. In most metropolitan markets, for example, the ownership of rental housing is not concentrated enough to confer monopoly power on owners. According to a National Multi Housing Council survey, the top fifty owners of apartments in the United States had an ownership interest in 2.96 million units in 2005, about 8% of the national stock of rental housing. STATISTICAL ABSTRACT: 2006, *supra* note 4, at 626 tbl.945; Mark Obrinsky, 2005 NMHC 50: *The More Things Change, the More They Stay the Same*, in NAT'L MULTI HOUSING COUNCIL, NMHC 50, at 10, 10 (2005), available at <http://www.nmhc.org/Content/servefile.cfm?FileID=4574>; see also *infra* text accompanying notes 123-132.
  30. See Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730 (1998); see also Lior Strahilevitz, *Information Asymmetries and the Right To Exclude*, 104 MICH. L. REV. 1835 (2006) (discussing varieties of exclusion strategies). On why rights to exclude from land should belong to the landowner and not to owners of personal property located on that land, see Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 390-91 (2001). A private landowner's other key entitlements are the right to control land uses and the power to transfer.
  31. When occupants formally lease their dwelling unit from a landlord, ownership relations may become multilayered. The prime tenants (those whose names appear on the lease) have in rem entitlements in a block of time and, depending on the lease provisions, commonly also have the power to transfer some or all of that block to a third party. See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 820-33 (2001). A prime tenant who makes a partial transfer to a third party is simultaneously a tenant of the prime landlord and also a sub-landlord of that third party.

to move in without the approval of Dad and Aunt Audrey, nor can she compel them to allow her to become the third co-owner of the Sitcom House.<sup>32</sup>

The right to accumulate private capital is the second core liberal property right. Without legal protection against confiscation by either a government or a private taker, an individual would have little incentive to accumulate enduring assets. In many settings, the protection of savings leads to the establishment of intermediary financial institutions, some of which can then serve as specialized mortgage lenders. This right to accumulate private capital enabled Dad and Aunt Audrey to come up with the down payment and financing they needed to purchase the Sitcom House. Partly because holdings of private capital are protected, about 80% of Americans, at some time in their lives, are able to become homeowners.<sup>33</sup>

Ownership of one's own person and labor is the last of the three basic liberal property rights. Because self-ownership entails the right to physically control the location and activities of one's own body, it is the entitlement most indispensable to the liberal ideal of self-determination. A household occupant commonly provides work around the home in exchange for receiving domestic services, such as meals and lodging, and in some instances wages. The Sitcom Household's au pair, Nadia, is voluntarily trading her labor for a compensation package of this sort. In a nonliberal regime, by contrast, a slave-owner or the state might own Nadia's human capital and have the power to decide, among other things, where she would live.<sup>34</sup> As a historical matter, most slaves—whether chattel or debt—have resided in or near their masters' households.

Henry Maine is renowned for his sweeping observation that “progressive societies” have moved away from defining rights and duties as immutable outgrowths of family and marital status and toward entitling individuals to

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32. The owners of a dwelling typically are entitled to exclude, for example, a sick and lonely outsider. Ambient norms, however, constrain exclusion decisions. See ROBERT FROST, *The Death of the Hired Man*, in COLLECTED POEMS OF ROBERT FROST 49, 53 (1939) (“Home is the place where, when you have to go there, / They have to take you in.”). And there also are some closely cabined exceptions to the legal right of a landowner to exclude. See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1382–85 (1993).

33. See JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING* 2005, at 36 (2005) (reporting that, in 2004, roughly 80% of U.S. household heads over age forty-five were homeowners, with the percentage peaking at 82.6% for those between the ages of sixty-five and seventy-four).

34. A slave who lacks the formal entitlement to trade labor for either monetary or in-kind compensation nevertheless may have some bargaining leverage in practice. See YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* 109–10, 113 (2d ed. 1997).

define these rights and duties by contract.<sup>35</sup> As Maine recognized, the key legal developments that gave rise to this trend were changes in property rights, namely legal conferrals of greater self-ownership rights on slaves, wives, and adult children who formerly had been under the thumbs of family heads.<sup>36</sup>

## 2. *Freedom of Exit: Of Households "At-Will"*

Individuals' entry and exit decisions combine to determine the membership rosters of both the owners and occupants of a particular household. As noted, a landowner's entitlement to exclude entails a plenary power to veto proposed entries. But a household's owner typically has scant authority to keep an adult participant in place. A liberal legal regime, consistent with its overarching principle of self-determination, generally grants a legally competent person robust unilateral rights to exit from a household relationship.<sup>37</sup> A co-occupant's right of exit consists of her privilege to physically remove both her person and her personal belongings from the previously shared abode. If Nadia wants to terminate her employment contract with Maureen, no one can force her to stay. Even if Nadia had previously promised Maureen that she would serve as a nanny for a certain period, Maureen could not obtain an injunction ordering Nadia to perform those personal services.<sup>38</sup> Laws against slavery and

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35. HENRY SUMNER MAINE, *ANCIENT LAW* 168-70 (Transaction Publishers 2002) (1861). Most commentators agree with Maine that there has been a broad historical trend toward freeing individuals from immutable blood and marriage obligations. See, e.g., MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 11-13, 41-46 (1981); CAROLE SHAMMAS, *A HISTORY OF HOUSEHOLD GOVERNMENT IN AMERICA* (2002) (documenting the enhancement, especially between 1840 and 1880, of the rights of wives, children, and domestic workers).
  36. Well into the nineteenth century, upon marrying, a woman typically ceded to her husband most of her powers to contract and own property. This compelled deprivation of a wife's ownership of her own labor was distinctly illiberal. On the coverture system and its breakdown, see, for example, Rick Geddes & Dean Lueck, *The Gains from Self-Ownership and the Expansion of Women's Rights*, 92 AM. ECON. REV. 1079 (2002); and Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994).
  37. This power of exit helps establish a threat point that influences the distribution of shares of household surplus. See *infra* text accompanying notes 57-63. The classic analysis of exit as a means of control is ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 21-25 (1970). Dagan and Heller place protection of the right of exit at the center of their vision of a normatively attractive regime that they call the "liberal commons." Dagan & Heller, *supra* note 1, at 567-77.
  38. The canonical precedent is *Lumley v. Wagner*, (1852) 42 Eng. Rep. 687 (Ch.), which denied the remedy of specific performance of a contract to perform as an opera singer. See also RESTATEMENT (SECOND) OF CONTRACTS § 367 (1979); Alan Schwartz, *The Case for Specific*

kidnapping also would bar Maureen from forcing Nadia to remain against her will.

The vocabulary of law and economics helps clarify the nature of an occupant's exit entitlements in a liberal society.<sup>39</sup> Because Nadia cannot waive her exit option by contract, her entitlement to leave the household is immutable. On the other hand, if Nadia had promised Maureen to stay for a full year and then had broken that promise, a court might order her to pay damages to Maureen. The rule that an occupant can costlessly exit from a household thus is merely a default. Those who want Nadia to remain a cohabitant cannot obtain property rule protection of that desire, but they can contract with her to obtain liability rule protection of it.

A liberal state is also likely to grant a co-owner, as a default, unilateral power to exit from a co-ownership relationship. Unless Aunt Audrey had contracted otherwise, she would have two ways of forcing the end of her arrangement with Dad. First, she could sell her ownership interest to a third party.<sup>40</sup> Second, she could unilaterally trigger judicial termination of the arrangement.<sup>41</sup> This is not to say that exit by a co-owner is utterly unconstrained. A judge adjudicating a partition action may order, as part of the final accounting, a cross-payment to correct disproportions in the co-owners' prior sharing of benefits and burdens. In some instances, this cross-payment provides a dose of liability rule protection to abandoned co-owners. American law also entitles co-owners to contract with one another to waive, for a limited

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*Performance*, 89 YALE L.J. 271, 297 (1979) (stating the case *against* specific performance of a personal services contract).

39. This now-conventional terminology derives from Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989), and from Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).
40. The default rule is that a co-owner in either joint tenancy with right of survivorship or tenancy in common can transfer all or a portion of an undivided interest to another. WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 5.7, at 201 (3d ed. 2000). *But cf.* Dagan & Heller, *supra* note 1, at 601, 620 (implicitly endorsing the statutory conferral on the remaining co-owners, as least as a default, of a right of first refusal).
41. In response to a petition for partition, a judge divides up the common asset (either in kind or in monetary value) according to shares of ownership. On the American law of partition, see STOEBUCK & WHITMAN, *supra* note 40, §§ 5.11-.13, at 214-24. On rights of partition in other nations, see Dagan & Heller, *supra* note 1, at 618-20. *Cf.* UNIF. P'SHIP ACT § 31 (1914) (entitling any partner to unilaterally dissolve a partnership); Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1341-43, 1391, 1394-96 (2006) (discussing investor exit from a business enterprise). *See generally* Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 LAW & CONTEMP. PROBS. 221 (1995) (discussing various exit systems, although not exit from co-ownership of real property).



time period, their entitlements to exit unilaterally by either sale or partition.<sup>42</sup> Thus, a co-owner's rights to terminate a relationship are less immutable than a co-occupant's rights. In addition, even in the absence of an express contract, norms typically constrain a person involved in an intimate co-ownership relationship from selling to another without the prior consent of the other owners. Without Dad's consent, for example, Aunt Audrey would hesitate to sell her share of the Sitcom House to the leader of the local motorcycle gang. (Now there's the germ of a plot for a half-hour of comedy!)

Finally, participants in a landlord-tenant (owner-occupant) relationship commonly also can end the relationship unilaterally without much delay.<sup>43</sup> When a residential tenancy is month-to-month, the landlord and tenant each are free to terminate after providing a month or so of notice to the other. When a residential tenancy is at-will, either party can exit even more swiftly. At least as a legal matter, Granny can move out without prior notice, thus terminating her implicit tenancy-at-will with Dad and Aunt Audrey. Correspondingly, however, those owners can peremptorily order Granny to leave the house.

When a landlord and residential tenant have entered into a lease for a term of years, their respective exit rights are more complex.<sup>44</sup> Both parties are entitled unilaterally to end the relationship at the end of the term. In addition, in the event of a material breach of the terms of the lease, the party not in breach typically is entitled to rescind the arrangement at an earlier date. When the term of a residential lease has not yet ended and neither party is in breach, however, the tenant typically has more robust exit rights than the landlord. Just as a liberal society immutably entitles an occupant to run out on other occupants, it also immutably entitles a tenant to abandon a leasehold, although at the risk of liability for damages to the landlord. Maureen can't force Nadia, by dint of their labor contract, to work as the au pair, and Dad and Aunt

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42. The right of a co-owner to partition or transfer his interest generally can be waived for a period of between five and fifteen years in a civil law jurisdiction and for a "reasonable period" in a common law jurisdiction, where the legal issue typically is seen as whether the waiver is a permissible restraint on alienation. See STOEUCK & WHITMAN, *supra* note 40, § 5.11, at 214; Dagan & Heller, *supra* note 1, at 616 & n.258. Dagan and Heller, the authors of the leading article on exit from co-ownership, discuss a variety of other possible limitations on exit, such as mandatory cooling-off periods. See Dagan & Heller, *supra* note 1, at 596-601.

43. See generally STOEUCK & WHITMAN, *supra* note 40, §§ 6.73-.79, at 389-96 (surveying the rules governing termination of interests in leases).

44. A participant in a landlord-tenant relationship may be able to exit from it by transferring his interest to a third party. Although default liberal principles generally support free alienability, a lease may contain provisions that limit transfer rights. See *id.* §§ 6.67-.72, at 379-88. Partly because an abusive occupant can inflict massive damage on a dwelling unit, lease provisions are more likely to constrain transfer of the tenant's interest than the landlord's interest.

Audrey, by dint of an express lease, can't force Nadia to dwell in the room over the garage. A residential landlord, by contrast, has no right to unilaterally rescind a term-of-years lease. If Nadia were to have negotiated for rights to occupy the guest quarters of the Sitcom House for a specific term and if she were not in material breach of that lease, her occupancy rights would be protected by a property rule, not simply a liability rule.<sup>45</sup> In the United States, the practical effects of this asymmetry between a tenant's and a landlord's exit rights are modest. Only in unusual contexts, such as in a cooperative apartment building or a jurisdiction that has rent controls or otherwise severely limits eviction rights, are residential tenants likely to have possessory rights that extend beyond a year or two.<sup>46</sup>

In sum, in a liberal society, the risk of exit by other participants typically looms over individuals enmeshed in all three types of household relationships. Of course, practical constraints such as social norms and the transaction costs of arranging a successor relationship commonly deter exit from a household relationship. As a legal matter, however, co-occupancy relationships among competent adults typically are at-will, and many co-ownership and landlord-tenant relationships are as well. Household ties thus tend to be far more fragile than either marital or family ties.<sup>47</sup> In contrast to divorce proceedings, which typically drag on for a year or more, and blood ties, which can never be sundered, many household relationships can dissolve in a twinkling.

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45. This asymmetry makes normative sense. A landlord's (and, for that matter, a co-owner's) duties are virtually never personal but instead delegable to others. If the law were to compel Dad and Aunt Audrey to lease the guest room to Nadia, it would not be forcing them to be personally present at the Sitcom House or at any other particular location. By contrast, if Nadia were personally required either to serve as a nanny for Chip or to inhabit the guest room, she would not be able to delegate those duties. Enforcement of those duties therefore would confine her movement. Even normally competent people occasionally enter into short-sighted or rash contracts. For paternalist reasons, a liberal society thus is unlikely to specifically enforce a promise by someone such as Nadia to be physically present in a particular household, just as it would not permit her to sell herself into slavery or indentured servitude. See *supra* text accompanying notes 37-39; *infra* text accompanying notes 158-160.

46. Unlike most American states and municipalities, however, many nations impose rent controls, good-faith eviction requirements, and other potent restrictions on a landlord's power to terminate a residential tenancy. See, e.g., Richard Arnott, *Rent Control: The International Experience*, 1 J. REAL EST. FIN. & ECON. 203, 206-09 (1988) (mentioning rent control regimes in various nations).

47. On the implications of the permanence of parental ties, see ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS (2004).

### 3. *Freedom of Contract*<sup>48</sup>

Liberal law also grants participants in a household relationship wide berth to tailor their internal arrangements according to their own tastes, at least when the interests of outsiders and helpless insiders such as children are not jeopardized.<sup>49</sup> Self-determination, the core liberal principle, is enhanced when people can both shape their own affairs and rely on the promises of others.<sup>50</sup> Individual endowments of the entitlements just canvassed—land, capital, and labor—provide starting points for bargaining. In the United States today, people have notably more freedom to shape their household relationships than their marital relationships. The state forbids certain marital couplings and typically requires a waiting period before both entry into marriage and exit from it.<sup>51</sup> By contrast, especially when the welfare of children is not at stake, a liberal state generally enables a competent adult to enter into all three types of basic household relationships with whomever he chooses. A gay or lesbian couple unable to marry typically can cohabit and co-own without legal impediment. Want to organize a counterculture commune? The background rules of a capitalist state generally pose no obstacle. There are, of course, some constraints on the creation of household clusters. For example, ambient social norms may deter an unmarried heterosexual or homosexual couple from “living in sin,” and zoning regulations may restrict the number and composition of a household’s co-occupants. In a liberal society, however, those

48. This phrase is potentially misleading because household members often coordinate by means of informal norms, not express contracts. See *infra* text accompanying notes 300–316.

49. See *infra* text accompanying notes 154–160.

50. See, e.g., Dagan & Heller, *supra* note 1, at 596 (endorsing freedom of contract among co-owners as long as exit is available and third-party interests are not jeopardized); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 686–89 (1980) (arguing that, as a constitutional matter, a government must have a substantial justification for interfering with co-occupants’ arrangements). But cf. Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983) (asserting that the structuring of intimate relationships can have broad social effects).

51. See, e.g., CAL. FAM. CODE § 308.5 (West 2004) (“Only marriage between a man and a woman is valid or recognized in California.”); N.Y. DOM. REL. LAW § 5 (McKinney 1999) (barring marriages between close relatives); *id.* § 6 (forbidding bigamy); *id.* § 15a (prohibiting marriages in which either party is under age fourteen); *id.* §§ 13, 13b (requiring persons intending to marry to obtain a license and, in the absence of a court order, then to wait at least twenty-four hours); *id.* § 170 (specifying permissible grounds for divorce, many of which require the parties to wait at least one year). But see, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the denial of a marriage license to a same-sex couple violated equal protection principles embodied in the state constitution).

who want to create a highly exotic household arrangement usually can find a place to do it.<sup>52</sup>

### C. Household Surplus and Its Distribution Among Members

The participants in each of the three relationships in a complex household—co-occupancy, co-ownership, and landlord-tenant—can arrange for mutually beneficial exchanges of goods and services, including ones that take advantage of their affective ties. Gains that arise from this internal household trade can be termed “household surplus.”<sup>53</sup> In a liberal environment that honors freedom of contract, individuals can be expected to choose household forms and associates with an eye toward maximizing shared gains of this sort.<sup>54</sup> The magnitude of the surplus available within household relationships depends in part on the participants’ ability to develop and enforce—by norm, contract, or otherwise—substantive and procedural rules to deter opportunistic behavior.<sup>55</sup> Although participants have an interest in maximizing their total shareable surplus, they inevitably fall short—often far short—of that ideal as a result of both transaction costs and inherent human incapacities.<sup>56</sup>

How do the participants in a household relationship divide surplus among themselves? The prevailing conception holds that, when labor is self-owned and occupants are free to exit, each adult occupant of a household has the leverage to obtain a share of the domestic pie.<sup>57</sup> In game-theoretic terms, a

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52. See *infra* notes 173, 356.

53. This is an extension of the notion of “marital surplus” employed in, for example, Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1270-80 (1998), and Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 529-31 (1998).

54. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract*, 113 YALE L.J. 541, 552-54 (2003) (discussing why parties to a contract tend to seek to maximize their joint gains).

55. See *infra* Part VII.

56. Transaction costs include search and information costs, bargaining and decision costs, and policing and enforcement costs. R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 6 (1988). On human limitations, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

57. See Shelly Lundberg & Robert A. Pollak, *Bargaining and Distribution in Marriage*, J. ECON. PERSP., Fall 1996, at 139; Shelly J. Lundberg et al., *Do Husbands and Wives Pool Their Resources? Evidence from the United Kingdom Child Benefit*, 32 J. HUM. RESOURCES 463 (1997); Wax, *supra* note 53; see also Mary Clare Lennon & Sarah Rosenfield, *Relative Fairness and the Division of Housework: The Importance of Options*, 100 AM. J. SOC. 506 (1994) (articulating an analogous approach within sociology). *But cf.* JOHN RAWLS, *A THEORY OF JUSTICE* 128-29

household participant's utility level in the event of exit establishes that member's "threat point."<sup>58</sup> (Although the following discussion assumes that a disgruntled participant's most potent threat is exit, in some instances it may be another course of action within the relationship, such as violence, nagging, withdrawal from sexual relations, or "burnt toast."<sup>59</sup>) Others in the relevant household relationship, to deter exit by a valued member, must allocate to that person enough surplus to make it more advantageous for that person to remain than to depart. If Dad wants Aunt Audrey to continue as a co-owner of the Sitcom House, he must make her investment pay off. If the other four co-occupants want Granny to remain an occupant, their rules governing use of the common spaces cannot be too harsh on her. Conversely, if Granny herself wants to remain in residence, she has to make her presence a net boon for Dad and Aunt Audrey, the (implicit) landlords who have the power to terminate her stay.

When a household member's opportunities to prosper on the outside improve, the risk that he or she will exit rises. Recognizing this reality, the other participants in the relevant relationship may prospectively allocate a larger share of the relationship's surplus to that person. In colonial Andover, Massachusetts, for example, as young men had increasingly better opportunities to the west, many fathers granted their youngest sons more land to dissuade them from migrating.<sup>60</sup> Even in present times, it is widely believed that a husband is likely to obtain a majority of the surplus from a marriage because he usually has greater opportunities to remarry after divorce, a reality that may make his threat of exit from a marital home more credible than his wife's.<sup>61</sup>

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(1971) (asserting that persons in "the original position" can be thought of as "heads of families"). For a review of the debate between Rawls and his feminist critics over his unwillingness to apply his principles of justice to internal family affairs, see Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 *FORDHAM L. REV.* 1537 (2004).

58. Lundberg & Pollak, *supra* note 57, at 146-49.

59. The source of the quoted phrase is Theodore C. Bergstrom, *Economics in a Family Way*, 34 *J. ECON. LITERATURE* 1903, 1926 (1996). For an analysis of the dynamics of these sorts of strategic options within marriage, see Shelly Lundberg & Robert A. Pollak, *Separate Spheres Bargaining and the Marriage Market*, 101 *J. POL. ECON.* 988 (1993).

60. Pollak, *supra* note 1, at 603-04 (drawing this example from PHILIP J. GREVEN, JR., *FOUR GENERATIONS* (1970)).

61. See, e.g., PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 53-56, 309-10 (1983); Wax, *supra* note 53, at 547-51. *But cf.* Margaret F. Brinig & Douglas W. Allen, "These Boots Are Made for Walking": *Why Most Divorce Filers Are Women*, 2 *AM. L. & ECON. REV.* 126, 136-37, 146-47, 154-60 (2000) (stressing that an ex-wife is more likely than an ex-husband to be awarded child support and custody rights to children).

Changes in law and social norms can alter threat points by influencing available opportunities and the transaction costs of exit. Enhancement of women's employment opportunities outside the home thus serves to boost their power within the home.<sup>62</sup> Legal reforms that make it easier for a spouse to divorce, a co-owner to partition real estate, or a landlord to evict a tenant all facilitate exit from a household relationship. These reforms thus strengthen the bargaining positions of household participants best positioned to ally themselves with fresh partners.<sup>63</sup>

## II. THE PREDOMINANT STRATEGY OF CONSORTING WITH INTIMATES

A person considering how to structure household relations in a liberal society faces a potentially intimidating number of choices. A graduate student who moves to a new university community, for instance, must decide whether to live alone or with others, what particular dwelling to inhabit, whether to buy or to rent that dwelling, and, if to buy, whether to bring in other co-owners. Of the three potential household relationships, co-occupancy is typically the most multi-stranded. Many co-occupants spend as many as half of their waking hours at home and are apt not only to engage in conventional forms of household production but also to socialize a great deal with one another. Both co-ownership and landlord-tenant relationships, by contrast, tend to be less intense, but even they commonly involve both significant sums of money and interactions protracted over months or years.<sup>64</sup>

Household relationships are rife with possibilities for opportunists. A bad occupant can abuse common spaces, pilfer personal property, neglect household duties, and evade duties to landlords. A bad owner may shirk on management and maintenance duties to the detriment of both tenants and other owners, and also wrongly siphon off assets. Yet in all phases of life, people tend to be more considerate of the interests of others than cynics anticipate. Experimental studies suggest that the majority of people prefer to

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62. See Steven L. Nock, *When Married Spouses Are Equal*, 9 VA. J. SOC. POL'Y & L. 48, 49-50 (2001).

63. There is mounting evidence that the advent of no-fault divorce raised divorce rates. See BRINIG, *supra* note 18, at 153-58.

64. "Most intuitive notions of the 'strength' of an interpersonal tie should be satisfied by the following definition: the strength of a tie is a (probably linear) combination of the amount of time, the emotional intensity, the intimacy (mutual confiding), and the reciprocal services which characterize the tie." Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360, 1361 (1973).

reciprocate favors even in one-shot interactions with perfect strangers.<sup>65</sup> Ex ante, an individual entering into a household relationship nevertheless would want to improve on those odds.<sup>66</sup>

One strategy would be to rely, in the event of trouble, on the legal system to impose sanctions on a domestic malefactor. This strategy would favor the negotiation of written contracts, documents likely to be helpful in the event of litigation or threats thereof. At the other end of the spectrum is the option of structuring household relationships in a fashion likely to bring into play informal deterrents to domestic opportunism. Even in the absence of legal constraints, a participant in a household relationship may act in a cooperative manner to avoid, for example, pangs of guilt, retribution by others in the relationship, or the sting of negative gossip and ostracism diffusely administered by friends and neighbors.<sup>67</sup> As the data presented in the next Part demonstrate, most people in contemporary liberal societies opt to take advantage of these informal social controls.

The essence of this household-formation strategy is, when feasible, to *consort with intimates*. Consorting with intimates, of course, is likely to be a source of great enjoyment in itself. But it can be expected also to have a great instrumental advantage: a colossal reduction of the transaction costs that household members have to incur to achieve mutually advantageous outcomes. From the start, intimates are more likely than those who are socially distant to behave cooperatively as opposed to opportunistically.<sup>68</sup> Intimacy thus

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65. See Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1663-72 (2003) (reviewing studies); see also Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273 (2004) (describing sharing among relative strangers).

66. Some commentators stress the limitations of rational-actor perspectives on domestic relations, asserting that they are descriptively incomplete and may have negative expressive consequences. See, e.g., MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* 15-22, 33-86 (1999); see also BRINIG, *supra* note 18, at 83-84 (highlighting the role of love in family relations). But see, e.g., Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 492-93 (2005) (asserting that intimates are routinely involved in the exchange of economic assets). See generally Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 111-22 (1998) (assessing objections to viewing interactions among intimates as exchange relationships).

67. See *infra* text accompanying notes 297-321.

68. A person behaves cooperatively when he takes into account the effects of his behavior on the welfare of all affected. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 3-11 (1984) (implicitly adopting this definition); *infra* notes 275-280 and accompanying text. Many studies indicate that cooperative behavior becomes more likely as social distance narrows. See, e.g., Nancy R. Buchan et al., *Swift Neighbors and Persistent Strangers: A Cross-Cultural Investigation of Trust and Reciprocity in Social Exchange*, 108 AM. J. SOC. 168 (2002); Michael

facilitates the spontaneous trading of services—in many household situations, a method of coordination far more efficient than formal bilateral contracting. In addition, intimates' early successes with this sort of gift exchange are likely to lead to a deepening of mutual trust and to even greater levels of cooperation thereafter.<sup>69</sup>

How does a person recognize a prospective intimate, especially when the candidate in question is not kin? Some key positive attributes, generally in order of decreasing importance, are the prospect of continuing future interactions, the number of participants involved (the fewer the better), and homogeneity of tastes.<sup>70</sup>

#### A. Favoring Those with Whom One Will Have Continuing Relations

The prospect of future interactions is well known to be conducive to trust and cooperation.<sup>71</sup> This is a major reason why, as the next Part documents, a large majority of household relationships are based on kinship. Robert Pollak, a pioneering analyst of marriage and the family, identifies four features of family ties that tend to foster cooperative behavior.<sup>72</sup> First, biologists

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W. Macy & John Skvoretz, *The Evolution of Trust and Cooperation Between Strangers: A Computational Model*, 63 AM. SOC. REV. 638 (1998).

69. Trust is conventionally defined as the expectation that another person will act cooperatively, instead of opportunistically, when both options are available. See Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1745-46 (2001). On how a past history of successful gift exchange can deepen trust, see Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 575-78 (1999); and Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 577-82, 591, 603-06. See also Theodore Caplow, *Christmas Gifts and Kin Networks*, 47 AM. SOC. REV. 383, 391-92 (1982) (discussing how the giving of Christmas gifts solidifies familial relationships). See generally JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 91-116 (1990) (defining "trust" and giving various examples of its importance in human interactions).
70. Other attributes, such as a sense of group identity, also may be helpful. General discussions of conditions that foster cooperative behavior can be found in David Sally, *Conversation and Cooperation in Social Dilemmas: A Meta-Analysis of Experiments from 1958 to 1992*, 7 RATIONALITY & SOC'Y 58 (1995), and in the sources cited in Blair & Stout, *supra* note 69, at 1759-80.
71. See, e.g., AXELROD, *supra* note 68, at 124-29; Claudia Keser & Frans van Winden, *Conditional Cooperation and Voluntary Contributions to Public Goods*, 102 SCANDINAVIAN J. ECON. 23, 31-33 (2000). When participants in a relationship expect that it will have a long future, they also are more likely to invest resources into strengthening the relationship.
72. Pollak, *supra* note 1, at 585-88; see also Haddock & Polsby, *supra* note 1, at 19-20, 24, 33-35. Pollak also notes some disadvantages of kinship-based households. The multifaceted nature of kinship ties poses risks that conflict will be imported into the household from an external



hypothesize the existence of an evolved altruism toward kin—especially toward persons whose gene pool one shares.<sup>73</sup> Kinship altruism motivates a person to act cooperatively without external prodding, thereby enabling kinfolk who co-occupy to arrange for productive activities that otherwise would be extremely difficult to monitor—for example, infant care or the cultivation of a delicate crop such as raspberries.<sup>74</sup> These self-executing first-party systems commonly are the most cheaply administered of all social controls. Second, Pollak notes that expulsion from a kinship network is particularly costly, presumably because that network is irreplaceable. Kinfolk thus are likely to be particularly well positioned to informally punish opportunistic acts, a significant second-party deterrent. Third and relatedly, information about a relative's past actions and character tends to be unusually complete, a reality that reduces the transaction costs of informal interactions. Fourth, in most societies ambient social norms support loyalty to kin. An opportunistic act at the expense of kinfolk thus is particularly likely to provoke neighbors to inflict diffuse third-party sanctions, such as negative gossip. In sum, the *ex ante* strategy of consorting with kin brilliantly harnesses the capabilities of the various informal systems of social control.<sup>75</sup>

Should appropriate kinfolk not be available, the next best option may be to associate with persons who share either preexisting friendships or—even better—the prospect of an enduring association multi-stranded enough to

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strand of the kinship relationship—for example, a sibling rivalry. Members who are added to a household mainly for kinship reasons are not likely to possess the labor skills the household most needs and also may make the household expand beyond its most efficient size. Pollack, *supra* note 1, at 587–88.

73. Kinship altruism tends to be strongest among those with the closest genetic ties. *See, e.g.*, DAVID M. BUSS, *EVOLUTIONARY PSYCHOLOGY: THE NEW SCIENCE OF MIND* 220–46 (2d ed. 2004); RICHARD DAWKINS, *THE SELFISH GENE* 88–108 (2d ed. 1989). Household relationships thus are more likely to involve closely related kin (e.g., parents and children) than more distantly related ones (second cousins).
74. *See* Robert McC. Netting, *Smallholders, Householders, Freeholders: Why the Family Farm Works Well Worldwide*, in *THE HOUSEHOLD ECONOMY: RECONSIDERING THE DOMESTIC MODE OF PRODUCTION* 221 (Richard R. Wilk ed., 1989); Pollak, *supra* note 1, at 591–93. *But cf.* B. Douglas Bernheim & Oded Stark, *Altruism Within the Family Reconsidered: Do Nice Guys Finish Last?*, 78 AM. ECON. REV. 1034 (1988) (offering caveats about the helpfulness of altruism in these contexts).
75. This of course does not mean that the strategy guarantees cooperative outcomes. As Tolstoy reminds us in the first sentence of *Anna Karenina*, not all families are happy. *See, e.g.*, *In re Marriage of Owen*, 797 P.2d 226, 228 (Mont. 1990) (mentioning an eviction notice that parents who owned a house had delivered to a son who was occupying it); *Esteves v. Esteves*, 775 A.2d 163 (N.J. Super. Ct. App. Div. 2001) (involving a suit by parents against their son over the division of proceeds from the sale of a house that the three had owned as tenants in common).

provide a wide variety of future sanctioning opportunities.<sup>76</sup> Suppose an incoming second-year law student, Earl, were seeking a housemate to share occupancy of a rental apartment during the upcoming academic year. All else equal, could Earl place more trust in Felix, a distant acquaintance from college who has no interest in eventually attending law school, or in Sandra, a law school classmate Earl currently knows even less well? During their college years, Earl may have learned something about Felix's character (including the internalized norms that constrain Felix)—an advantage as far as it goes.<sup>77</sup> In promoting cooperative interactions, however, past contacts are likely to be less helpful than a prospect of continuing social ties. Suppose Earl were to doubt whether Felix and he would still be friends once their joint living arrangement had ended. If so, especially toward the end of their cohabitation, Felix might become less trustworthy because he would be less concerned about how either Earl or members of their circle of common acquaintances would treat him in the future. If Earl were to conclude that Sandra and he actually had better prospects of being enmeshed in an enduring friendship and network of friends, the strategy of consorting with intimates would tilt Earl toward living with Sandra.

### *B. Limiting the Number of Persons in the Relationship*

For several reasons, as the number of persons in a household relationship increases, participants in that relationship are likely to become more opportunistic.<sup>78</sup> First, rising numbers commonly make it more costly to obtain the information needed to deter opportunism. A person who lives with just one co-occupant, upon discovering at breakfast that the refrigerator's container of orange juice is unexpectedly empty, immediately knows who the culprit is. A person with four other housemates, by contrast, would have to engage in more extensive detective work. Second, the larger the group, the greater the tendency to free-ride with respect to making contributions that would benefit the whole group. In the case of the empty orange juice container, if there were only two

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76. Individuals are likely to care more about how intimates, as opposed to relative strangers, regard them. This makes esteem sanctions among intimates especially potent. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 386-90 (1997).

77. See Thomas Gautschi, *History Effects in Social Dilemma Situations*, 12 RATIONALITY & SOC'Y 131 (2000).

78. See Robert Axelrod & Douglas Dion, *The Further Evolution of Cooperation*, 242 SCIENCE 1385, 1389 (1988); Per Molander, *The Prevalence of Free Riding*, 36 J. CONFLICT RESOL. 756, 766-68 (1992). But cf. Sally, *supra* note 70, at 77 (reporting that cooperation in experimental multiperson games seems not to depend much on the number of players).

co-occupants, all of the benefits of informal punishment of the excessive imbibor would accrue to the enforcer. If there were a total of five housemates, by contrast, significant benefits would be externalized to others. Although there also are advantages in associating with more co-occupants or co-owners, the disadvantages typically outweigh them. Of the Americans residing in non-family households, the number living in twosomes is over twenty times the number living in fivesomes.<sup>79</sup>

### C. Favoring Homogeneity of Tastes and Stakes

Most people prefer to consort with those who share their attitudes and orientations.<sup>80</sup> When co-occupants have homogeneous tastes, they can more readily agree on what television shows to watch, what magazines to subscribe to, how to stock the refrigerator, and what friends to invite to dinner. When co-owners have similar discount rates and architectural tastes, they can more easily decide on what capital improvements to make. A landlord and tenant get along better when they share sensibilities about standards of housekeeping and levels of noise. As a result, to the extent that tastes vary according to attributes such as social class, age, gender, and ethnicity, participants in a household relationship can be expected to show a tendency to cluster accordingly.<sup>81</sup> This is especially true in the case of co-occupants, whose interactions are the most multi-stranded.

While homogeneity in tastes is advantageous, homogeneity in skills is disadvantageous.<sup>82</sup> More potential gains from internal trade are available when the parties in a household relationship possess complementary talents. A great cook can benefit from living with a great electrician. A landlord who lacks home-repair skills may favor a tenant who has them.

Homogeneity—indeed equality—of stakes and power in a household relationship also is likely to be advantageous.<sup>83</sup> Equality offers both consumption and transactional advantages. Equality is the most prominent

79. See *infra* p. 256 tbl.2. See generally *infra* text accompanying notes 90-132, 228-253.

80. PETER M. BLAU, EXCHANGE AND POWER IN SOCIAL LIFE 69-70 (1964).

81. Cf. BECKER, *supra* note 23, at 108-34 (discussing “assortative mating” that tends to bring together partners of like quality); Edward L. Glaeser et al., *Measuring Trust*, 115 Q.J. ECON. 811, 814 (2000) (offering experimental evidence that individuals are more trustworthy when they deal with persons of the same race and nationality).

82. See BECKER, *supra* note 23, at 30-53, 57-64.

83. On various conceptions of equality within marriage, see Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 91-94 (2004); and Wax, *supra* note 53, at 533-37.

(i.e., focal) of available arrangements.<sup>84</sup> Perhaps partly for this reason, many adults in a liberal society prefer to interact as equals.<sup>85</sup> Sociologists and economists also assert that equality among participants tends to foster cooperative behavior, partly because it reduces decision-making costs.<sup>86</sup> In part to avoid hassles about how to share rent and utility costs, graduate students who co-occupy are likely to prefer to rent a dwelling unit whose bedrooms are roughly equal in quality. Residents of many intentional communities are ideologically committed to egalitarian distributions of both occupancy and ownership rights.<sup>87</sup> When co-owners' endowments of capital permit, they are likely to prefer to own in equal shares, and, in the absence of evidence to the contrary, judges will presume that they do.<sup>88</sup> Although the landlord-tenant relationship is inherently asymmetrical in many respects, lawmakers commonly attempt to establish certain symbolic equalities between the two parties. For example, state statutes typically set, for both landlords and tenants, the same minimum period for notice to terminate a month-to-month tenancy.<sup>89</sup>

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84. See generally Richard H. McAdams, *Cultural Contingency and Economic Function: Bridge-Building from the Law & Economics Side*, 38 LAW & SOC'Y REV. 221, 223-25 (2004) (discussing how cultural influences can make certain equilibria particularly salient).
  85. Egalitarianism has primal roots. See CHRISTOPHER BOEHM, *HIERARCHY IN THE FOREST: THE EVOLUTION OF EGALITARIAN BEHAVIOR* (1999); see also Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247, 262-72 (1992) (discussing the extent of egalitarianism among co-owners of common property resources); cf. B. Douglas Bernheim & Sergei Severinov, *Bequests as Signals: An Explanation for the Equal Division Puzzle*, 111 J. POL. ECON. 733, 733-34 (2003) (reporting that in the United States, about two-thirds of parents' wills bestow equal bequests on surviving children).
  86. See, e.g., DONALD BLACK, *THE BEHAVIOR OF LAW* 11-36 (1976) (sociologist of law); HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 39-44 (1996) (law-and-economics scholar).
  87. See CHRIS SCOTTHANSON & KELLY SCOTTHANSON, *THE COHOUSING HANDBOOK* 168 (rev. ed. 2005). But see ZABLOCKI, *supra* note 23, at 290-320 (reporting the typical reality of a status hierarchy, headed by a charismatic leader).
  88. On the rebuttable presumption of equal ownership of shares, see, for example, *Bryan v. Looker*, 640 N.E.2d 590 (Ohio Ct. App. 1994); *STOEBUCK & WHITMAN*, *supra* note 40, § 5.2, at 179-80; and *id.* § 5.13, at 221-22. Traditionally, co-owners in joint tenancy had to own in equal shares (the so-called unity of interest). See *id.* § 5.3, at 183; see also TONI IHARA ET AL., *LIVING TOGETHER: A LEGAL GUIDE FOR UNMARRIED COUPLES* 3/9, 6/17-/18 (12th ed. 2004) (offering a form contract providing for equal ownership of a home).
  89. See, e.g., CAL. CIV. CODE § 1946 (West 1998) (thirty days); FLA. STAT. ANN. § 83.57(3) (West 2004) (fifteen days).

### III. A HISTORICAL OVERVIEW OF HOUSEHOLD FORMS

Most adults in a liberal society indeed prefer to consort with intimates when they enter into a co-occupancy, co-ownership, or landlord-tenant relationship. This Part marshals statistics to support this basic proposition.

#### A. Occupants of Households: The Predominance of Small, Kin-Based Clusters

##### 1. Number of Occupants

Veteran observers of households—that is, all of us—will not be startled by the fact that the occupants of most households in the United States can be counted on the fingers of one hand. As Table 1 indicates, 91% of the Americans living in housing units in 1999 were living in households with five or fewer occupants.<sup>90</sup>

As a nation becomes more prosperous, its households generally become smaller.<sup>91</sup> The average number of occupants in an American home fell from 5.8 in 1790, to 4.8 in 1900, to 2.6 in 2004.<sup>92</sup> Although households do tend to be somewhat larger in less developed countries, the American pattern is hardly

90. According to the Census Bureau, in 1999 there were 1.3 million households with seven or more occupants, and together they included a population of 10,219,000. This figure is calculated from data presented in U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 1999, at 62 (2003) [hereinafter AMERICAN HOUSING SURVEY: 1999]. It is important to note, however, that during the 1990s the Census Bureau placed all households occupied by ten or more unrelated persons in the “group quarters” category. *Id.* app. A, at A-9. In 2000, when the Bureau was no longer classifying these households in this fashion, it tallied a total of 7.8 million people living in a group quarters of some sort. About half of these individuals were in institutions formally authorized to provide supervised care or custody, and about another quarter were residents of college dormitories. See U.S. Census Bureau, 2000 Census of Population and Housing Summary File 1: Technical Documentation 6-84 to -88 (Mar. 2005), <http://www.census.gov/prod/cen2000/doc/sfi.pdf> (indexing data for matrix PCT17). For more on the group quarters population, see *supra* note 3; and *infra* text accompanying notes 116–118.

91. Peter Laslett, an eminent historian of the household, found that the average household size in England remained relatively constant from 1600 to 1900, at about 4.75. Peter Laslett, *Mean Household Size in England Since the Sixteenth Century*, in *HOUSEHOLD AND FAMILY IN PAST TIME* 125, 138 (Peter Laslett & Richard Wall eds., 1972). By 1961, however, the number had dropped to 3.04. *Id.*

92. The figures for 1790 and 1900 are from 1 U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 41 (bicentennial ed. 1975); the figure for 2004 is from STATISTICAL ABSTRACT: 2006, *supra* note 4, at 51. These sources also reveal that the percentage of American dwelling units housing seven or more persons fell from 36% in 1790, to 20% in 1900, to 1% in 2004.

exceptional. In 2005, average household size was 2.0 in Sweden, 2.5 in Japan, 3.3 in China, 3.5 in Brazil, 5.2 in India, and 10.0 in Senegal.<sup>93</sup>

Table 1.  
OCCUPANTS OF U.S. HOUSING UNITS, 1999<sup>94</sup>

NO. OF OCCUPANTS	% OF OCCUPIED HOUSING UNITS	% OF OCCUPANTS OF HOUSING UNITS
1 person	26.2	10.2
2 persons	32.9	25.8
3 persons	16.2	19.0
4 persons	14.8	23.2
5 persons	6.5	12.7
6 persons	2.2	5.2
7 persons or more	1.3	3.9

2. Family vs. Non-family Households

The co-occupants of households typically are kinfolk. In 1998, 85% of the U.S. population resided in multiperson family households, that is, households in which there was a householder and at least one other occupant related to the householder by birth, adoption, or marriage.<sup>95</sup> In that same year, another 10%

93. United Nations, Human Settlements Data Bank, [http://hq.unhabitat.org/programmes/guo/guo\\_hbdb4.asp](http://hq.unhabitat.org/programmes/guo/guo_hbdb4.asp) (last visited Oct. 9, 2006); see also SHLOMO ANGEL, HOUSING POLICY MATTERS: A GLOBAL ANALYSIS 351 (2000) (reporting World Bank data for 1990); *infra* notes 235-247 and accompanying text. In both Sweden and Japan, as in the United States, average household size has fallen by roughly half during the past century or two. See Orvar Löfgren, *Family and Household: Images and Realities: Cultural Change in Swedish Society*, in HOUSEHOLDS: COMPARATIVE AND HISTORICAL STUDIES OF THE DOMESTIC GROUP 446, 466 (Robert McC. Netting et al. eds., 1984) (reporting that in 1890, Sweden's average household size was 4.56); Chie Nakane, *An Interpretation of the Size and Structure of the Household in Japan over Three Centuries*, in HOUSEHOLD AND FAMILY IN PAST TIME, *supra* note 91, at 517, 531 (estimating the average household size in preindustrial Japan at 4.9).

94. Calculated from data presented in AMERICAN HOUSING SURVEY: 1999, *supra* note 90, at 62. Columns may not total 100% due to rounding.

95. Unless otherwise indicated, the data in this paragraph are drawn from STATISTICAL ABSTRACT: 1999, *supra* note 3, at 60-62. The Census Bureau defines a householder as an occupant whose name either appears on the deed or lease to the dwelling unit, or, when

of the U.S. population—that is, two-thirds of those not residing in a family household—lived alone.<sup>96</sup> The Introduction made passing reference to the remaining 5%, that is, the 12.3 million people residing in multi-occupant non-family households. Table 2 indicates the size distribution of these clusters of unrelated co-occupants. A comparison of Tables 1 and 2 reveals that housemates who lack kinship ties generally form smaller groupings than kinfolk do. In 1998, multi-occupant non-family households had 2.4 residents on average, while family households had 3.2. As Table 2 demonstrates, among the Americans living in non-family settings in 1998, three times as many were in singles than in doubles, and four times as many were in doubles than in triples. Only one non-family household in 1000 had six or more occupants.<sup>97</sup>

Table 2.  
U.S. NON-FAMILY HOUSEHOLDS, 1998<sup>98</sup>

NO. OF OCCUPANTS	% OF NON-FAMILY HOUSEHOLDS	% OF OCCUPANTS OF NON-FAMILY HOUSEHOLDS
1 person	83.19	68.18
2 persons	13.41	21.98
3 persons	2.18	5.37
4 persons	0.85	2.78
5 persons	0.24	0.98
6 persons	0.12	0.57
7-9 persons	0.02	0.15

there is an oral lease, is responsible for paying rent. AMERICAN HOUSING SURVEY: 1999, *supra* note 90, app. A, at A-8.

96. See *infra* note 240 (citing sources on trends toward living alone).

97. In 1940, 2.8% of non-family households contained four or more members. JAMES A. SWEET & LARRY L. BUMPASS, AMERICAN FAMILIES AND HOUSEHOLDS 349 (1987). As Table 2 indicates, by 1998 the figure had fallen to 1.2%.

98. Calculated from data reported in STATISTICAL ABSTRACT: 1999, *supra* note 3, at 61 tbl.72. Columns may not total 100% due to rounding. The third column assumes (conservatively) that households of seven to nine occupants contain an average of eight occupants each.

Again, the pattern in the United States is unexceptional. From Mesopotamia to Europe, since the beginning of recorded history and indeed in all societies in all historical periods, most occupants of households typically have been related by marriage or blood.<sup>99</sup>

### 3. *Varieties of Larger Households*

Although small nuclear family households predominate, more complex forms also exist.

*Family households that include unrelated members.* In the late nineteenth century, perhaps as many as one-fifth of U.S. households included at least one boarder or live-in servant unrelated to the household's head.<sup>100</sup> Today no more than 5% of U.S. households do.<sup>101</sup>

*Extended family households.* Extended family households are thought to have been predominant during the early historical periods of the ancient Near East, at least in rural areas.<sup>102</sup> The conventional image, fostered by Homer's *Odyssey*, is that of an enterprise of dozens of persons hierarchically governed by a *paterfamilias* who resides with several of his married adult children and their families.<sup>103</sup> Partly on account of polygamy and (especially) slavery, households then might have included scores or hundreds of occupants.<sup>104</sup> As cities and markets developed, however, there was a trend toward downsizing to the nuclear family household. The *oikos* of the Classical period in Greece, for instance, was a more compact institution than the Homeric household that had

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99. On patterns in the ancient Near East, see, for example, sources cited in Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI-KENT L. REV. 321, 354-57 (1995). On Europe, see, for example, DAVID HERLIHY, *MEDIEVAL HOUSEHOLDS* (1985); and *HOUSEHOLD AND FAMILY IN PAST TIME*, *supra* note 91. On Ghana, see Jack Goody, *The Evolution of the Family*, in *HOUSEHOLD AND FAMILY IN PAST TIME*, *supra* note 91, at 103. On Asia and the Arab world, see sources cited *infra* notes 113-114.

100. See, e.g., Edward T. Pryor, Jr., *Rhode Island Family Structure: 1875 and 1960*, in *HOUSEHOLD AND FAMILY IN PAST TIME*, *supra* note 91, at 571, 586 (reporting that the portion of Rhode Island households that included one or more nonrelatives declined from 24% to 2% between 1875 and 1960).

101. AMERICAN HOUSING SURVEY: 1999, *supra* note 90, at 62-64 (indicating that 1% of households include lodgers and 4% include unrelated adults who are neither co-owners nor co-renters).

102. See Ellickson & Thorland, *supra* note 99, at 354-57.

103. See BOOTH, *supra* note 27, at 15-34.

104. See HERLIHY, *supra* note 99, at 58-59.



prevailed four centuries or so earlier.<sup>105</sup> Xenophon, a canonical source on Greek life during the fourth century B.C.E., portrays a Classical household that has a single husband-wife team at its core.<sup>106</sup>

After the fall of Rome, slavery went into decline and family farms managed by nuclear households came to the fore in northwestern Europe. In an influential challenge to the previously prevailing view that extended family households had been the norm in Europe prior to the nineteenth century, Peter Laslett adduced evidence that the nuclear household in fact had predominated.<sup>107</sup> By medieval times, most English and French peasants were living in nuclear households whose number of occupants averaged on the order of six and seldom exceeded ten.<sup>108</sup> In far eastern Europe, however, larger and more complex households generally remained the norm.<sup>109</sup>

A century ago, an American couple commonly took into their home an elderly parent who had become a widow or widower.<sup>110</sup> Extended family households of this sort are now exceptional. Three or more generations of the same family are present in only 3% of American households.<sup>111</sup> In sharp contrast to the conventional image of rural life in ancient times, only 1% of U.S. households now include two or more married couples.<sup>112</sup> Although the

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105. On the Classical Greek household, see BOOTH, *supra* note 27, at 34-93; and CHERYL ANNE COX, *HOUSEHOLD INTERESTS: PROPERTY, MARRIAGE STRATEGIES, AND FAMILY DYNAMICS IN ANCIENT ATHENS* (1998). Cf. Ellickson & Thorland, *supra* note 99, at 355 (discussing Mesopotamia).

106. XENOPHON, *OECONOMICUS* 58-61, 137-59 (Sarah B. Pomeroy trans., Oxford Univ. Press 1994) (c. 362 B.C.E.). On the possibility that Xenophon was being more normative than descriptive, see COX, *supra* note 105, at 132-35.

107. Peter Laslett, *Introduction: The History of the Family*, in *HOUSEHOLD AND FAMILY IN PAST TIME*, *supra* note 91, at 1. Laslett later restricted the scope of this thesis to northwestern Europe. Peter Laslett, *Family and Household as Work Group and Kin Group: Areas of Traditional Europe Compared*, in *FAMILY FORMS IN HISTORIC EUROPE* 513 (Richard Wall et al. eds., 1983). See generally David I. Kertzer, *Household History and Sociological Theory*, 17 ANN. REV. SOC. 155 (1991) (reviewing historians' debate over trends in household size).

108. See, e.g., BARBARA A. HANAWALT, *THE TIES THAT BOUND: PEASANT FAMILIES IN MEDIEVAL ENGLAND* 5, 103-04 (1986); HERLIHY, *supra* note 99, at 62-72.

109. See John Hajnal, *Two Kinds of Pre-Industrial Household Formation System*, in *FAMILY FORMS IN HISTORIC EUROPE*, *supra* note 107, at 65.

110. See Steven Ruggles, *The Transformation of American Family Structure*, 99 AM. HIST. REV. 103 (1994); *infra* note 240.

111. AMERICAN HOUSING SURVEY: 1999, *supra* note 90, at 62, 64. The Sitcom Household, which contains four generations of occupants, is thus an extreme outlier.

112. STATISTICAL ABSTRACT: 1999, *supra* note 3, at 60 tbl.70. See generally Ronald Angel & Marta Tienda, *Determinants of Extended Household Structure: Cultural Pattern or Economic Need?*, 87 AM. J. SOC. 1360 (1982) (attributing these arrangements mostly to economic need); Burton

cultural traditions of many nations, such as Japan and South Korea, have supported the formation of multigenerational households, these patterns are fast eroding under rising tides of prosperity.<sup>113</sup> In India, where a bride traditionally has moved into her husband's extended family household, the average household size is 5.2; in the United States, the average size of an Indian-American household is 3.1.<sup>114</sup>

*Large non-family households.* As mentioned, non-family households tend to be smaller than family households. Large numbers of non-kin, however, sometimes do co-occupy a residential complex that delivers common meals and other collective domestic services. At present over 50,000 people in the United States reside in housing units where seven to nine unrelated individuals sleep and eat their meals.<sup>115</sup>

An additional 3.7 million persons voluntarily live in complexes that the Census Bureau calls "group quarters."<sup>116</sup> A resident of a group quarters may have a separate sleeping space but typically eats meals in a congregate dining

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Pasternak et al., *On the Conditions Favoring Extended Family Households*, in MARRIAGE, FAMILY, AND KINSHIP: COMPARATIVE STUDIES OF SOCIAL ORGANIZATION 125 (Melvin Ember & Carol R. Ember eds., 1983).

113. On Japanese traditions, see, for example, S. Philip Morgan & Kiyosi Hiroshima, *The Persistence of Extended Family Residence in Japan: Anachronism or Alternative Strategy?*, 48 AM. SOC. REV. 269 (1983). In 1950, 80% of elderly Japanese were living with one of their children, but by 1990 only 50% were. Andrew Mason et al., *Population Momentum and Population Aging in Asia and Near-East Countries* 70 (2000), [http://www2.eastwestcenter.org/research/popecon/aging\\_report.PDF](http://www2.eastwestcenter.org/research/popecon/aging_report.PDF). In South Korea, the fraction of elderly women living with their children fell from 78% in 1984 to 47% in 1994. *Id.*

Sources on Chinese household and familial traditions include THE CHINESE FAMILY AND ITS RITUAL BEHAVIOR (Hsieh Jih-chang & Chuang Ying-chang eds., 1985), and Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1622-56 (2000). Household forms in Egypt in 1976 are described in Philippe Fargues, *The Arab World: The Family as Fortress*, in 2 A HISTORY OF THE FAMILY: THE IMPACT OF MODERNITY 339, 356-57 (André Burguière et al. eds., 1996), which reports that a majority of urban households, but not rural households, were nuclear.

114. See U.S. CENSUS BUREAU, WE THE PEOPLE: ASIANS IN THE UNITED STATES 8 (2004); *supra* text accompanying note 93. On Indian traditions, see THE EXTENDED FAMILY: WOMEN AND POLITICAL PARTICIPATION IN INDIA AND PAKISTAN (Gail Minault ed., 1981).
115. See STATISTICAL ABSTRACT: 1999, *supra* note 3, at 61 tbl.71.
116. U.S. Census Bureau, *Total Population in Households and Group Quarters by Sex and Selected Age Groups for the United States*, tbl.1 (Mar. 20, 2001), <http://www.census.gov/population/cen2000/grpqr/grpqtr01.pdf> [hereinafter *Group Quarters Population*]. This figure excludes 4.1 million "institutionalized" persons living under supervised care or custody in facilities such as orphanages, nursing homes, and penitentiaries. *Id.* For the Census Bureau's technical definitions of "housing units" and "group quarters," see AMERICAN HOUSING SURVEY: 1999, *supra* note 90, at A-9 to -10; and *supra* notes 3, 90.

facility. The voluntary group quarters category includes institutions such as dormitories, fraternities and sororities, military quarters, eldercare facilities, residential complexes of religious orders, and intentional communities. Non-kin who cluster in large numbers may be able to exploit efficiencies of scale in the production of shelter, meals, social interactions, and other valued services, but at the sacrifice of individual autonomy and privacy.<sup>117</sup> Not surprisingly, these arrangements disproportionately attract those who are single, childless, and relatively impecunious; while 5.4% of Americans aged eighteen to twenty-nine years live in a voluntary group quarters, the percentage falls to 0.6% for those aged thirty to forty-nine years.<sup>118</sup>

An intentional community can be defined as a self-governed association of ten or more residents, most of them unrelated, who live in strongly communal fashion (that is, as a matter of ideology, they not only share living spaces but also dine together for most of their meals).<sup>119</sup> Some intentional communities, such as most back-to-nature communes and most Israeli kibbutzim, are secular. Others, such as those of Benedictine monks and Hutterites, are unified by common religious belief. Various fragments of evidence suggest that there were over 1000 intentional communities in the United States in 2005.<sup>120</sup> Although some of these had more than 100 co-occupants, the median community housed roughly two or three dozen.<sup>121</sup> In 2005 the total population of strongly communal intentional communities in the United States probably

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117. See *infra* text accompanying notes 228-247.

118. Calculated from Group Quarters Population, *supra* note 116.

119. Zablocki's definition of a commune is more restrictive in some ways, but also more generous in that it only requires the presence of five or more adults. See ZABLOCKI, *supra* note 23, at 7.

120. ROBERT P. SUTTON, MODERN AMERICAN COMMUNES: A DICTIONARY (2005), profiles many of the most prominent. The Census Bureau does not attempt a tally. On the Bureau's historic difficulties in enumerating communities of this sort, see ZABLOCKI, *supra* note 23, at 72 n.†. A valuable source, doubtless incomplete, is Fellowship for Intentional Cmty., Community Directory, <http://directory.ic.org/iclist/> (last visited Sept. 1, 2006) [hereinafter IC List].

121. On October 10, 2005, a random sample (IC Sample) of 122 intentional communities with six or more members was drawn from the entire IC List, *supra* note 120. The communities in this sample reported a median of eighteen adult residents, and 7% reported over 100 (tabulations on file with author). See also *infra* note 343. The Order of Saint Benedict, on the information page that it posts at the Fellowship for Intentional Community website, see Fellowship for Intentional Cmty., Community List: Order of St. Benedict, [http://directory.ic.org/records/?action=view&page=view&record\\_id=878](http://directory.ic.org/records/?action=view&page=view&record_id=878) (last visited Sept. 1, 2006), states that the average population of its communities (all of them single-sex) is forty. The typical Hutterite community is several times more populous, but because Hutterites have so many children, it is likely to include fewer adults. See Ellickson, *supra* note 32, at 1360.

was between 30,000 and 80,000. By comparison, in that same year 30 million Americans, perhaps to the dismay of Robert Putnam, were living alone.<sup>122</sup>

### *B. Owners of Dwelling Units*

The owners of a dwelling unit conventionally are defined as the persons so identified in pertinent deeds and court decrees.<sup>123</sup> There have been no comprehensive surveys of the ownership of all forms of residential structures in the United States. However, particularized surveys of the ownership of real estate in general, and of private rental housing in particular, have revealed a now-familiar pattern: on the order of 90% of private dwelling units of all types are owned either by one or two individuals. Co-owner groups thus tend to be even smaller than co-occupant groups.<sup>124</sup> Moreover, when a twosome does co-own, the individuals involved usually are intimates—most commonly marriage partners, self-identified unmarried partners, or other kinfolk such as the two siblings who hypothetically own the Sitcom House.<sup>125</sup>

Studies of the grantees of all forms of land transfers, a somewhat overly broad category for present purposes, support these assertions. Carole Shammass and her co-authors sampled deeds recorded in Bucks County, Pennsylvania, between 1890 and 1980. In 1890, almost all real estate was in the name of a single individual (typically the husband in the case of a married couple). By 1980, almost 70% of Bucks County deeds named a husband and wife as co-grantees (typically as joint tenants with right of survivorship).<sup>126</sup>

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122. STATISTICAL ABSTRACT: 2006, *supra* note 4, at 52 tbl.55; cf. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (decrying the atomization of American life).

123. This is the Census Bureau's definition. See AMERICAN HOUSING SURVEY: 1999, *supra* note 90, app. A, at A-8, A-25. It is also the usual legal definition. See, e.g., STOEBUCK & WHITMAN, *supra* note 40, § 10.12, at 779-84 (discussing the key role of deeds and other documents in proof of marketability of title).

124. See *supra* p.255 tbl.1 (indicating that 40.9% of households have three or more occupants).

125. The National Association of Realtors (NAR) periodically mails out a questionnaire that asks a large sample of homebuyers nationwide to identify themselves. In 2005, 30% of respondents reported that they were single buyers; 61%, married couples; 7%, "unmarried couples"; and the remaining 2%, "other." Stephanie Rosenbloom, *For Men, A Fear of Commitment*, N.Y. TIMES, Feb. 12, 2006, § 11 (Real Estate), at 1 (citing NAT'L ASS'N OF REALTORS, PROFILE OF HOME BUYERS & SELLERS (2005)); Telephone Interview with Shauna Hightower, Nat'l Ass'n of Realtors (Spring 2006). Although these findings support the conclusions above, the response rate to NAR's 2005 survey was 5.4%, which makes it less credible than the sources mentioned later in the text.

126. CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 172 (1987).

William Hines, in a study of deeds recorded in Iowa between 1954 and 1964, found that about 40% of the deeds named single grantees and another 56% named a husband and wife.<sup>127</sup>

A more recent and far more comprehensive source is the Property Owners and Managers Survey (POMS) that the U.S. Census Bureau conducted in the mid-1990s to determine the identities of owners of private residential rental buildings.<sup>128</sup> Because co-owners of rental housing don't have to live together, one might expect that they would tend to be somewhat less intimate than owner-occupants. The Census Bureau nevertheless found that the co-ownership of rental housing, even of mid-sized apartment buildings, is mostly a mom-and-pop sort of enterprise.

About one-third of all residential rental units in the United States are single-family properties. At the time of the POMS, the landlords of 47% of these were single individuals, and the landlords of another 41% were pairs of individuals.<sup>129</sup> Multifamily buildings predictably attract somewhat larger numbers of owners, including investors formally organized in some form of business association.<sup>130</sup> Nonetheless, the POMS found that single individuals and pairs of individuals owned 59% of the units in the nation's private multifamily rental structures.<sup>131</sup> Even the owners of rental complexes with fifty

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127. Computed from data presented in N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582, 607, 617 (1966). (A caveat: Hines included in the single-grantee category not only individuals but also corporations, trusts, and estates.) See also Byron D. Cooper, *Continuing Problems with Michigan's Joint Tenancy "with Right of Survivorship"*, 78 MICH. B.J. 966, 966 n.3 (1999) (reporting that, in a sample of 300 deeds to one or more individuals in 1989 in Wayne County, Michigan, 158 involved grants to single individuals, 114 to married couples in tenancy by the entirety, 24 to joint tenants, and 4 (all by operation of law) to tenants in common); sources cited in Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 WIS. L. REV. 334, 398 n.204.

128. U.S. CENSUS BUREAU, PROPERTY OWNERS AND MANAGERS SURVEY (POMS) (1995), <http://www.census.gov/hhes/www/housing/poms/poms.html> [hereinafter POMS]. In this Article, all percentage figures derived from POMS data exclude from the denominator the number of units that the Census Bureau included in the "not reported" category. It is likely that the forms of ownership respondents declined to report were of greater than average complexity. As a result, the exclusion of the unreported category from the denominator probably biases upward the percentages reported here for the simpler forms of ownership and biases downward those reported for the more complex forms.

129. See *id.* tbl.97. Four percent of the single-family rental properties were owned by three or more participants either in cotenancy or in partnership. See *id.* For-profit corporations owned another 4%. See *id.* tbl.96.

130. See *infra* text accompanying notes 248-252.

131. POMS, *supra* note 128, tbl.97. The survey found that one or two individuals owned 88% of the units in three- to four-unit multifamily buildings, 67% in ten- to nineteen-unit

or more units are more likely to be organized as a limited or general partnership (41%) than as a for-profit corporation or real estate investment trust (24%).<sup>132</sup> Co-owners, like co-occupants, plainly see advantages in limiting the number of people with whom they consort.

### C. Residential Landlord-Tenant Relationships

Because the landlord-tenant relationship may be highly fractious, an occupant can benefit greatly from having an intimate landlord. Most Americans, perhaps surprisingly, succeed in this quest. The principal ploy is to live in either a self-owned dwelling or one that is owned by other co-occupants. In 2003, 68% of occupied U.S. dwelling units had at least one owner-occupant, up from slightly less than half during the period 1900 to 1940.<sup>133</sup> And of the dwellings that have at least one owner-occupant, in a remarkable 96%, *all* of the owners reside there.<sup>134</sup> In this respect, the Sitcom House, which is partly owned by an absentee, Aunt Audrey, is a distinct outlier.

The desire for this arrangement—homeownership—runs deep. When asked by pollsters in 1999 which items on a list of two dozen constituted part of “the good life,” Americans included “a home you own” more often (88%) than any other item, including “a happy marriage” (76%) and “a lot of money” (57%).<sup>135</sup> The pattern in the United States again is not exceptional. In most Western European nations, the majority of dwellings are owner-occupied.<sup>136</sup>

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buildings, and 25% in fifty-plus-unit buildings. *See id.* These percentages include owners of beneficial interests held either in cotenancy or partnership, and also fiduciary ownership by the trustees of an estate. The figures exclude, however, ownership by a corporation with only one or two shareholders.

George Sternlieb’s classic studies of slum tenements provide a basis for comparison. In 1964, when Sternlieb first studied Newark, just over 50% of the tenements were owned either by individuals or husband-wife pairs, and under 20% by corporations. GEORGE STERNLIEB, *THE TENEMENT LANDLORD* 122, 253 (1969). (Sternlieb also found that approximately 40% of the tenements were owned by a landlord who owned no other rental property. *Id.* at 122.) By 1972, of the slum properties not owned by the City of Newark, almost two-thirds were owned by individuals or husband-wife pairs. *See* GEORGE STERNLIEB & ROBERT W. BURCHELL, *RESIDENTIAL ABANDONMENT: THE TENEMENT LANDLORD REVISITED* 56 (1973).

132. POMS, *supra* note 128, tbl.96.

133. STATISTICAL ABSTRACT: 2006, *supra* note 4, at 630 tbl.952; James W. Hughes, *Economic Shifts and the Changing Homeownership Trajectory*, 7 HOUSING POL’Y DEBATE 293 (1996).

134. AMERICAN HOUSING SURVEY: 1999, *supra* note 90, at 76 tbl.2-13.

135. Karlyn Bowman, *The Good Life*, AM. ENTERPRISE, June 2000, at 60.

136. *See* U.N. ECON. COMM. EUR., BULLETIN OF HOUSING STATISTICS FOR EUROPE AND NORTH AMERICA 2004, tbl.A, [http://www.unece.org/env/hs/prgm/hsstat/Bulletin\\_04.htm](http://www.unece.org/env/hs/prgm/hsstat/Bulletin_04.htm) (last

The earliest historical records indicate that owner-occupancy of a house was common in ancient times as well.<sup>137</sup> There have been exceptions, of course, notably the various communist collectivizations that shifted formal ownership of all land to the state, but these have mostly proved to be ephemeral.<sup>138</sup>

A group of co-occupants unwilling or unable to acquire a dwelling unit, but nonetheless desirous of a trustworthy relationship, can seek to rent from a landlord with whom the group has close ties. According to one of the most intensive studies of landlord-tenant relations, an early 1970s Rand survey of residential rentals in and around Green Bay, Wisconsin, “[t]wenty percent of the single-family residences and an appreciable number of units in multiple dwellings were occupied by relatives of the landlord.”<sup>139</sup> Tenants also can seek to rent an apartment in a small building owned by individuals who currently reside in another unit of the same building. In the United States, a building containing two to four dwelling units is indeed more likely than not to be owner-occupied.<sup>140</sup> In part because repeat face-to-face interactions tend to abet cooperation, many tenants have reason to prefer living only steps away from their landlords.<sup>141</sup> Not all tenants, of course, succeed in cozying up to their landlords in any one of these fashions: about one-quarter of co-occupant groups in the United States face the unlovely prospect of dealing with a landlord at arm’s length.<sup>142</sup>

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visited Oct. 9, 2006) (indicating that the rate of homeownership in Western Europe ranges from a low of 39.9% in Sweden to a high of 80% in Ireland).

137. Ellickson & Thorland, *supra* note 99, at 337 n.80, 338.

138. On the privatization of apartments in Russia and elsewhere in the former Soviet Bloc after 1989, see sources cited in Heller, *supra* note 25, at 647-50.

139. RAND CORP., FIRST ANNUAL REPORT OF THE HOUSING ASSISTANCE SUPPLY EXPERIMENT 53 (1974).

140. This fact can be deduced from the following Census data: owners inhabit one out of five dwelling units in residential structures that contain two to four units. STATISTICAL ABSTRACT: 1999, *supra* note 3, at 729 tbl.1212. Assuming that owners occupy a maximum of one unit per structure, if these structures were to contain 2.5 units on average, a conservative assumption, it would follow that 50% (one-fifth of 2.5) of the structures would be owner-occupied. If these structures were to contain 3.0 units on average, 60% (one-fifth of 3.0) of them would be owner-occupied.

141. The residency of an owner in a multifamily structure with two to four units is associated with better building maintenance, particularly of common areas. See Frank W. Porell, *One Man’s Ceiling Is Another Man’s Floor: Landlord/Manager Residency and Housing Condition*, 61 LAND ECON. 106 (1985).

142. Given that 68% of homes are owner-occupied, see *supra* text accompanying note 133, and that a significant minority of tenants rent from either family members or friends, this is the approximate fraction that remains.

## IV. ARE THE HOUSEHOLD FORMS THAT ENDURE NECESSARILY BEST?

Many utopian thinkers, from Plato on, have placed reform of the household at or near the top of their agendas. Critics have two basic grounds for questioning the worthiness of a liberal society's conventional household institutions.<sup>143</sup> The first is that the actual process of household formation in a given liberal society may well be too beset with imperfections to produce sound outcomes. More radically, a critic may challenge the normative soundness of liberalism itself. The lackluster histories, in a wide variety of cultures, of experiments with collectivized living, however, suggest that conventional household institutions do have significant intrinsic merits.

A. *Utopian Designs of Unconventional Households*

For millennia, drastic reform of the conventional household has been a central theme of the utopian canon. Visionaries have imagined settlements where dozens or even hundreds of unrelated adults dine together and reside in collectively governed housing.<sup>144</sup> In *The Republic*, Plato proposes that the governing class of Guardians share dwellings, storehouses, wives, and a modest food allotment.<sup>145</sup> Thomas More's *Utopia* depicts a fictional island where each city row-house is occupied by ten to sixteen adults—assigned to it by central authorities—who take their meals in yet larger groups in common dining halls.<sup>146</sup> In the nineteenth century, Friedrich Engels, Charles Fourier, Robert Owen, and other utopian socialists sharply criticized conventional

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143. For guarded discussions of the inferences that can be drawn from the survivorship of an ownership form, see HANSMANN, *supra* note 86, at 22-23; and Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999).

144. On utopian thought, see generally KRISHAN KUMAR, *UTOPIA AND ANTI-UTOPIA IN MODERN TIMES* (1987); and FRANK E. MANUEL & FRITZIE P. MANUEL, *UTOPIAN THOUGHT IN THE WESTERN WORLD* (1979). Human psychology evolved during an era when people lived communally as hunter-gatherers. See BOEHM, *supra* note 85; BUSS, *supra* note 73. Perhaps as a result, humans may be evolutionarily inclined to favor depictions of relatively complex domestic arrangements. Kinship ties typically are strong in hunter-gatherer bands, see ALEXANDRA MARYANSKI & JONATHAN H. TURNER, *THE SOCIAL CAGE: HUMAN NATURE AND THE EVOLUTION OF SOCIETY* 81-89 (1992), but utopians rarely envision kinship as the glue of an intentional community.

145. PLATO, *THE REPUBLIC*, bk. 3, at \*416d-e, bk. 4, at \*419-20c.

146. MORE, *supra* note 24, at 47, 55-60. More's volume depicts even larger rural households that contain a minimum of forty adults. *Id.* at 44. More himself probably regarded *Utopia*'s scheme as unworkable. See PETER ACKROYD, *THE LIFE OF THOMAS MORE* 169-75 (1998).



households, partly on the ground that they were venues for the oppression of women.<sup>147</sup>

The United States has been particularly fertile ground for the imagining of alternative household forms. Two peaks of intellectual ferment were the Utopian Socialist era of 1824 to 1848 and the Woodstock era of 1965 to 1978. Edward Bellamy's *Looking Backward*, one of the bestsellers of the late nineteenth century, envisions a future of nuclear family households whose occupants rent their dwellings from the state, eat meals cooked in public kitchens, and obtain household cleaning and nursing services from assigned members of a national industrial force.<sup>148</sup> In *Walden Two*, B.F. Skinner depicts a community of nearly 1000 persons who share a common eating room and reside in personal rooms located within a complex of buildings governed by a six-person Board of Planners.<sup>149</sup>

These visionaries rarely articulate their reasons for doubting the soundness of conventional household forms. There are, however, facially plausible reasons for doubt.

*B. Possible Imperfections, from a Liberal Perspective, in the Process of Household Formation*

*1. Illiberal Background Conditions*

When a given society's law and norms insufficiently protect the core entitlements of private property, freedom of exit, and freedom of contract, a committed liberal has reason to doubt the optimality of its conventional household institutions. Two vignettes from Russian history illustrate the perversities of household formation under illiberal conditions. As noted, the Soviet Union at times assigned several previously unacquainted families to share an urban housing unit.<sup>150</sup> These *komunalkas* persisted not because they were popular with occupants (quite the contrary!), but rather because occupants lacked exit options due to the state's monopolization of housing

147. See FREDERICK ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE 138-39 (Eleanor Burke Leacock ed., Int'l Publishers 1972) (1884) (predicting that, after the demise of capitalism, "social industry" would supplant the role of the private household); Siegel, *supra* note 36, at 1094-96 (discussing Fourier and Owen); see also Siegel, *supra* note 36, at 1198-1205 (describing the post-Civil War cooperative housekeeping movement, whose adherents aspired to create meta-households).

148. EDWARD BELLAMY, LOOKING BACKWARD 2000-1887 (The Modern Library 1951) (1887).

149. B.F. SKINNER, WALDEN TWO 18-20, 40-44, 48 (Macmillan Publ'g Co. 1976) (1948).

150. See *supra* text accompanying note 25.

supply and control over residency permits. Conditions in Russia prior to the 1917 Revolution were more subtly illiberal. Residents of rural repartitional villages (*miri*) then commonly were mired in a rigid sociopolitical system that afforded them few choices and scant exit opportunities.<sup>151</sup>

In addition, even a state whose basic aspirations do comport with liberal ideals inevitably falls short in practice. A liberal state must control intra-household violence, for example, to ensure that domestic participants truly are free to exercise their powers of exit.<sup>152</sup> No legal system, however, can detect and prevent all forms of private coercion. As a result, an occupant may remain in a suboptimal household solely out of fear that a decision to depart would provoke a violent response from an abandoned housemate. Moreover, exit is not completely costless even when there is no risk of violence. An occupant who leaves a household, for example, must incur moving expenses, the transaction costs of winding up intra-household claims, and the sacrifice of any household-specific human capital. And a risk-averse occupant may remain in a household solely as a result of fear that a seemingly better prospect would not pan out.<sup>153</sup> Liberal critics of conventional practices thus have some normative basis for questioning prevailing household forms.

## 2. *A Liberal State's Duties To Control Externalities and Protect Incompetents*

A liberal state has two basic rationales for regulating how individuals or groups use private property and enter into contracts: externalities and paternalism.<sup>154</sup> In the absence of appropriate legal policies addressing these considerations, liberal critics may be skeptical of the worthiness of a civil society's conventional institutions and practices.

Many areas of liberal law address the complications posed by pervasive externalities. At a back-to-nature commune with scores of occupied dwellings, both members and neighbors may need governmental help to control

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151. See Ellickson, *supra* note 32, at 1393-94.

152. Violations of occupants' entitlements to bodily integrity are the events most likely to bring police officers to a household's door. See *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498 (1993).

153. See generally Andreas Flache, *Individual Risk Preferences and Collective Outcomes in the Evolution of Exchange Networks*, 13 RATIONALITY & SOC'Y 304 (2001) (modeling the effects of risk aversion on partner selection).

154. See, e.g., Ayres & Gertner, *supra* note 39, at 88; see also BRINIG, *supra* note 18, at 8-10 (noting, in addition, the possibility of problems arising on account of incomplete information and, in contexts of bilateral monopoly, rent extraction).

occupants whose activities threaten the spread of disease.<sup>155</sup> Similarly, when increased risks of fire and disease would result from substandard housing conditions, housing codes may force a landlord and tenant to agree on a higher level of quality than those two parties otherwise would choose. When co-owners are numerous and when unilateral exit by one of them would be highly disruptive, the state may limit a co-owner's right of partition.<sup>156</sup> More controversially, liberal lawmakers may seek to forbid consensual household arrangements that offend public morals—for example, occupants who live in a polygamous fashion.<sup>157</sup>

In addition, a liberal state properly adopts various paternalist policies to protect incompetent persons from entering into inadvisable household relationships. Members of a significant fraction of the population—notably children and the mentally disabled—are prevented from exercising powers of ownership and choosing their residences. Unable to protect themselves by exit, these individuals are potentially vulnerable to abuse by those who govern their living spaces. Liberal legal systems respond by attempting to prevent other household occupants from neglecting or abusing children, incompetent adults, or, for that matter, pets.<sup>158</sup> Moreover, even legally competent individuals are susceptible at times to errant and impulsive decision-making.<sup>159</sup> A liberal state responds, for example, by paternalistically making some entitlements immutable, including the entitlement of an occupant to decamp from a household.<sup>160</sup>

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155. See *People v. Wheeler*, 106 Cal. Rptr. 260 (Ct. App. 1973) (authorizing the county to abate a commune's unsanitary conditions that posed risks of internal and external epidemics).

156. Most states deny condominium owners the power to partition common areas held in tenancy in common. See, e.g., UNIF. CONDO. ACT § 2-107(e) (1980).

157. See, e.g., *State v. Green*, 99 P.3d 820, 820 (Utah 2004) (upholding the conviction of a man who had been living with several women he regarded as wives, even though at no time was he ever formally married to more than one of them); see also IRWIN ALTMAN & JOSEPH GINAT, *POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY* (1996).

158. See Peter David Brandon, *State Intervention in Imperfect Families: The Child, the State, and Imperfect Parenting Reconsidered from a Theory of Comparative Advantage*, 13 RATIONALITY & SOC'Y 285 (2001). One conception is that the state tries to assure that the rules of a household that contains minor children, incompetent adults, or other helpless members are identical to the rules that would exist if those members were not lacking in capacity. See Gary S. Becker & Kevin M. Murphy, *The Family and the State*, 31 J.L. & ECON. 1, 1 (1988).

159. See generally Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211 (2003) (advocating selectively paternalistic regulation to counter human errors in decision-making).

160. See *supra* text accompanying notes 37-39; see also *supra* note 42 (discussing limitations on the waiver of partition rights).

### 3. Perverse Government Policies

A liberal critic of conventional household institutions might contend that the state has not only mishandled these externality and paternalism issues, but also that it pursues other small-bore public law policies that distort individuals' choices of household forms.<sup>161</sup> Regulatory programs, for example, may unjustifiably limit household options. Draconian zoning ordinances can overly restrict owners' choices about what to build and occupants' choices about where and how to live. The law of intestate succession can confer co-ownership of a house on several surviving heirs who never would have chosen that arrangement on their own.<sup>162</sup> A stiff rent-control program deprives landlords and tenants of freedom of contract, limits their ability to exit from the relationship, poorly matches tenants with units, and crimps housing production and maintenance.<sup>163</sup>

Government spending and taxation programs similarly can distort the shape of household institutions. For instance, the rules that govern eligibility for welfare benefits or liability for income taxes may capriciously influence an individual's choice of co-occupants.<sup>164</sup> Many observers contend that the

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161. A useful overview of pertinent policies is Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 27-79 (1996). "Small-bore" denotes a legal rule whose scope and impact is insufficient to qualify it as a foundational or background rule, in the sense that those adjectives are employed *supra* Section I.B. This distinction admittedly is fuzzy.

162. Because most people strive to avoid owning with more than one or two others, these co-owners might be expected either to buy one another out promptly or to agree to sell all their interests to a third party. Nonetheless, many observers contend that intestate succession contributed to the excessive fractionalization of ownership of many African-American farms in the rural South and to the eventual transfer of too many of these farms to non-black owners. See, e.g., Dagan & Heller, *supra* note 1, at 551, 603-09; Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 517-23 (2001).

163. See, e.g., Arnott, *supra* note 46, at 209; Edward L. Glaeser & Erzo F.P. Luttmer, *The Misallocation of Housing Under Rent Control*, 93 AM. ECON. REV. 1027 (2003).

164. On the influence of various spending programs, see Ingrid Gould Ellen & Brendan O'Flaherty, *Do Housing and Social Policies Make Households Too Small? Evidence from New York* (Sept. 12, 2002) (unpublished manuscript, on file with author). Ellen and O'Flaherty assert that housing and income maintenance policies—particularly Section 8 housing allowances, public housing, and food stamps—tend to reduce the average number of adult occupants in New York City households, and for no good reason. On the influence of taxation policy, see, for example, Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993); and Henry E. Smith, *Intermediate Filing in Household Taxation*, 72 S. CAL. L. REV. 145 (1998). On creditors' rights policies, see, for example, Alison D. Morantz, *There's No Place Like Home:*

Internal Revenue Code excessively subsidizes homeownership.<sup>165</sup> Massive government support for subsidized housing projects can crowd out the private production of housing. By concentrating the supply of low- and moderate-income housing in a few institutional providers, this policy can diminish less affluent tenants' choices of landlords, locations, and building types.

*C. Is Liberalism Overly Destructive of Solidarity?*

The foregoing qualms about the optimality of existing household forms all were articulated from within the paradigm of liberal thought. But if liberalism itself is unsound, the household forms that evolve under liberal conditions plainly are not worthy of deference.<sup>166</sup> Some critics of liberalism, such as Duncan Kennedy and William Simon, appear to regard robust rights of exit—a core principle of liberalism—as particularly corrosive.<sup>167</sup> As Albert Hirschman famously observed, ease of exit from an association may reduce willingness to

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*Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245 (2006).

165. See, e.g., Steven C. Bourassa & William G. Grigsby, *Income Tax Concessions for Owner-Occupied Housing*, 11 HOUSING POL'Y DEBATE 521 (2000); Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25, 39-56 (1991). Some policy analysts, however, defend favoritism toward homeowners on the ground that homeownership has positive social consequences. See, e.g., John C. Weicher, *Comment on Steven C. Bourassa and William G. Grigsby's "Income Tax Concessions for Owner-Occupied Housing,"* 11 HOUSING POL'Y DEBATE 547 (2000). These social benefits are reviewed in Robert D. Dietz & Donald R. Haurin, *The Social and Private Micro-Level Consequences of Homeownership*, 54 J. URB. ECON. 401 (2003).
166. Some feminist scholars contend that liberalism fails to recognize that individuals are not autonomous decision-makers but instead are socially interdependent. See, e.g., Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992); see also sources cited in Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman's The Autonomy Myth*, 93 CAL. L. REV. 1285, 1288 n.12, 1289 n.13 (2005) (book review); cf. MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993) (expressing concern about the effects of individualistic ethics on family institutions). A sensible liberal commentator should acknowledge, however, that individuals are constrained, often for the benefit of others, by internalized norms, altruistic feelings arising out of love and family ties, gift-exchange obligations, diffuse social pressures, legal rules, and other influences. Liberal principles favor individual self-determination not in a social vacuum but within the bounds of these constraints. See Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 20-21 (1990).
167. See Duncan Kennedy, *The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 HOW. L.J. 85 (2002) (advocating the creation of limited equity housing cooperatives from which owner exit is constrained); William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 (1991) (same). The perceived value of stability in domestic arrangements similarly animates much social-conservative thinking—for example, its support of covenant marriage.

participate actively in its affairs, or, in his terms, to exercise voice and to commit oneself to loyalty.<sup>168</sup> It thus is possible that untrammelled liberal rights to terminate household relationships impede the achievement of the deepest forms of domestic solidarity.<sup>169</sup>

A liberal, however, has a number of responses. First, American law recognizes and responds to the concerns embedded in this critique. A competent occupant or owner who hungers for a particularly close-knit relationship is entitled to waive certain exit rights—for example, to agree to be liable to those abandoned in the event of departure.<sup>170</sup> Second, the dynamics of household formation are better analyzed from an *ex ante* than an *ex post* perspective. People are far more likely to be willing to enter into a relationship when they know they can readily exit from it later. On balance, robust exit rights thus actually may help bring people together. Third, a participant's power of exit can improve the quality of an ongoing household relationship in various ways. Some liberals assert that maintaining a relationship when ready exit from it is possible is the deepest expression of solidarity and commitment.<sup>171</sup> In addition, a participant's threat of exit helps deter other participants from denying that participant a satisfactory share of household surplus.<sup>172</sup> A person who is unable to exit is vulnerable to exploitation, and exploited persons are likely to become malcontents whose presence poisons household interactions. Difficulties in exiting, for example, contribute to the bitterness of landlord-tenant relationships in rent-control jurisdictions and accounted for some of the misery of co-occupants' lives in *komunalkas*.

#### *D. The Unpromising History of Experiments with Unconventional Household Forms*

For the reasons just canvassed, it is foolhardy to deem extant household institutions to be perfectly optimal. Utopians have imagined, however, that many individuals would prefer to be involved in household relationships that involve far more people than conventional households do. Each year in the United States, there are dozens of new attempts to create intentional

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168. HIRSCHMAN, *supra* note 37, at 33-36, 76-77.

169. See Dagan & Heller, *supra* note 1, at 574-77, 596-602; Ellickson, *supra* note 32, at 1375-80. See generally Walzer, *supra* note 166 (asserting that these sorts of communitarian critiques, although eternally relevant, are substantively weak).

170. See *supra* text accompanying note 39.

171. See Frantz & Dagan, *supra* note 83, at 87; Karst, *supra* note 50, at 637-38.

172. See Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 171 (1998); *supra* text accompanying notes 57-63.

communities.<sup>173</sup> The historical record, however, indicates that, at the end of the day, few individuals want to entangle themselves in highly complex household relationships.<sup>174</sup>

An intentional community united by religious belief is likely to fare better than a secular community.<sup>175</sup> The Hutterites (organized in 1528) and the monasteries and convents of the Order of Saint Benedict (established in 530) are examples of long-lived religious sects that have devised replicable forms of intentional community. Seeking to comply with the Biblical precept of living with “all things common,”<sup>176</sup> both sects require the dozens of adult residents of each of their communities to dine together for virtually all meals. According to the sect’s own figures, perhaps 8000 Hutterites now live on eighty-nine different rural settlements in the United States, most of them in the northern Great Plains.<sup>177</sup> The Order of Saint Benedict claims a total of 174 monasteries and convents in the United States,<sup>178</sup> with an average membership of forty.<sup>179</sup>

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173. For a historical overview of intentional communities, particularly in the United States, see ZABLOCKI, *supra* note 23, at 19–80. See also Ellickson, *supra* note 32, at 1357–62. The founders of intentional communities sometimes encounter zoning problems and other hurdles, but their legal advisors seldom regard these as insurmountable barriers. See SCOTTHANSON & SCOTTHANSON, *supra* note 87, at 237–50; Rob Sandelin, Dealing with Government Agencies, <http://www.ic.org/nica/Construction/build1b.htm> (last visited Oct. 9, 2006) (offering legal advice to the founders of an intentional community of any form). As the text explains, a new intentional community’s problems tend to lie not on the supply side but on the demand side.

174. In the United States, the portion of the population involved in intentional communities has “never much exceeded one per one thousand.” ZABLOCKI, *supra* note 23, at 31. In addition, large non-family households are unusual. See *supra* p. 256 tbl.2.

175. ZABLOCKI, *supra* note 23, at 37, 151. John Noyes’s faith-based Oneida community, for example, endured from 1848 to 1881, when its members implemented a sweeping privatization program. See MAREN LOCKWOOD CARDEN, ONEIDA: UTOPIAN COMMUNITY TO MODERN CORPORATION, at xiii–xiv, 113–16 (1969). A prominent counterexample is Rajneeshpuram, whose rapid rise and rapid fall in central Oregon in 1981 to 1986 is depicted in JAMES S. GORDON, THE GOLDEN GURU: THE STRANGE JOURNEY OF BHAGWAN SHREE RAJNEESH 99–207 (1987).

176. Acts 2:44. See generally MARTIN HENGEL, PROPERTY AND RICHES IN THE EARLY CHURCH 8–9, 31–34 (John Bowden trans., 1974) (describing the communal sharing of goods in early Christian societies).

177. Calculated from figures that the Hutterian Brethren themselves provided at Fellowship for Intentional Cmty., Communities Directory: Hutterian Brethren (Mar. 7, 2005), [http://directory.ic.org/records/?action=view&page=view&record\\_id=570](http://directory.ic.org/records/?action=view&page=view&record_id=570). The total population of Hutterite communities has been mounting, almost entirely on account of the sect’s extraordinarily high birth rates. See Ellickson, *supra* note 32, at 1360. For more extended discussion of Hutterite settlements, see *id.* at 1346–47, 1350–61.

178. Order of Saint Benedict, Geographic Search Form, <http://www.osb.org/geog/searchform.asp> (last visited Oct. 9, 2006) (search for “U.S.A.”).

In contrast to the communities formed by members of these religious sects, most secular experiments with strongly communal forms of living and dining implode within a handful of years.<sup>180</sup> This was true during the Utopian Socialist era of 1824 to 1848, when Fourierism, Owenism, and the like inspired the creation of, among others, Brook Farm in Massachusetts, New Harmony in Indiana, and Oneida in New York.<sup>181</sup> It also was true during the Woodstock era of 1965 to 1978, a period that gave rise to a large burst of experiments in collective living.<sup>182</sup>

Most Israeli kibbutzim, which typically are secular, were founded prior to the establishment of the State of Israel in 1948. In general, kibbutzim have shown an impressive capacity to endure. By the mid-1980s, however, many kibbutzim had fallen into severe financial difficulty and were losing the allegiance of younger members, who had begun to cool on the collectivist ideal.<sup>183</sup> In response to this crisis, many kibbutzim began to privatize previously collectivized functions.<sup>184</sup> Originally committed to congregate dining at no charge, most kibbutzim have begun to charge fees for meals and to

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179. Fellowship for Intentional Cmty., *supra* note 121. The Benedictines have had their ups and downs over the centuries. See 2 NEW CATHOLIC ENCYCLOPEDIA 272-74 (2d ed. 2003) (recounting the Order's major reversals in England and France after the Middle Ages).
180. A commune whose residents live in social isolation and share a common ideology is apt to endure longer than one that lacks these features. See Benjamin D. Zablocki & Rosabeth Moss Kanter, *The Differentiation of Life-Styles*, 2 ANN. REV. SOC. 269, 290-91 (1976).
181. Brook Farm was in operation in West Roxbury from 1841 to 1847. STERLING F. DELANO, BROOK FARM: THE DARK SIDE OF UTOPIA 40, 310 (2004). Robert Owen started his version of New Harmony in 1825, but gave up on it within a few years. On Oneida, see *supra* note 175.
182. See ZABLOCKI, *supra* note 23, at 148-51 (reporting that a newly established Woodstock-era commune had roughly a 30% chance of enduring for four years or more).
183. See Joshua Muravchik, *Socialism's Last Stand*, COMMENTARY, Mar. 2002, at 47, 50-53. Prior to the mid-1980s, many kibbutzim had benefited from loans from kibbutz federations and special government-supported banks. The declining electoral fortunes of the Labor Party led to reductions in this outside support. On the repercussions, see Joel Brinkley, *Debts Make Israelis Rethink an Ideal: The Kibbutz*, N.Y. TIMES, Mar. 5, 1989, at A14.
184. The earliest kibbutz cooperative associations leased their lands from the Jewish National Fund, a charitable organization. The State of Israel, after its establishment in 1948, largely assumed the Fund's role as lessor. In 2004, the Israeli Cabinet approved a new form, the "renewing kibbutz," that over half of kibbutzim had adopted by early 2006. In a renewing kibbutz the state is empowered to transfer a specific housing unit by long-term lease to an individual member, with the kibbutz holding a right of first refusal in the event of a proposed further transfer. E-mail from Amnon Lehavi, Professor of Law, Radzyner Sch. of Law, Herzliya, Isr., to author (July 9, 2006, 11:43:17 EST) (on file with author); E-mail from Amnon Lehavi, Professor of Law, Radzyner Sch. of Law, Herzliya, Isr., to author (Feb. 23, 2006, 08:07:34 EST) (on file with author).



permit members to have separate kitchens.<sup>185</sup> Between 1991 and 1998, the percentage of kibbutzim that had cancelled the practice of regularly serving a communal evening meal rose from 9.2% to 57.8%.<sup>186</sup>

In recent decades, co-housing has been a relatively active sector in the generally stagnant movement to create secular intentional communities. Pioneered in Denmark in the 1970s, the co-housing template offers a watered-down, but potentially durable, form of communal life.<sup>187</sup> A typical co-housing settlement consists of a few dozen dwelling units, each separately owned and occupied by either a single individual or members of a conventional household.<sup>188</sup> As in a condominium development, these participants also share ownership of the community's common areas. In co-housing, the most important shared asset is the "common house," a facility designed to permit the preparation and serving of collective meals, the signal feature of the movement.<sup>189</sup> Although few co-housing communities offer group meals on a daily basis, most do provide them at least twice a week.<sup>190</sup> Attendance at these group meals typically is optional. Even staunch advocates of the co-housing model insist that each dwelling unit must come equipped with a separate kitchen, even though those facilities readily enable unit occupants to opt out of the collective meal.<sup>191</sup> Despite the enthusiasm of its promoters, the co-housing

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185. Muravchik, *supra* note 183, at 51; see also Karby Leggett, *Pay-as-You-Go Kibbutzim*, WALL ST. J., May 26, 2005, at B1.

186. Raymond Russell et al., *Processes of Deinstitutionalization and Reinstitutionalization Among Israeli Kibbutzim, 1990-1998*, at 12 (Aug. 12-16, 2000), <http://research.haifa.ac.il/~kibbutz/pdf/rusty2000.PDF>.

187. See SCOTTHANSON & SCOTTHANSON, *supra* note 87; Mark Fenster, *Community by Covenant, Process, and Design: Cohousing and the Contemporary Common Interest Community*, 15 J. LAND USE & ENVT'L L. 3 (1999).

188. In a Hutterite community or traditional kibbutz, by contrast, a married couple typically was granted the exclusive right to occupy a sleeping quarters, but not the right to sell or rent those premises.

189. This "common house" is the principal physical feature that distinguishes a co-housing development from a subdivision governed by a conventional homeowners' association. A conventional association may have a community room of some sort, but it is likely to be more modestly sized and equipped.

190. See *supra* note 120; *infra* note 191.

191. The FAQ section of the website of the Cohousing Association of the United States used to include the following:

*If I live in cohousing, will I have my own kitchen?*

You may well wonder why we have put this seemingly insignificant question [second to] the top of our list. Frankly, because it is the single question most frequently asked of cohousing enthusiasts. Yes, every cohousing community does have a common kitchen, but community meals are usually prepared and served in

concept does not seem to have tapped into a large unserved market. In the United States, from 1991 to 2005, co-housing represented less than one housing start in 10,000, and toward the end of that time period the number of newly opened projects had plateaued at about a half-dozen per year.<sup>192</sup>

The near universality of private kitchens in both kibbutzim and co-housing communities indicates that communitarian practice has veered sharply away from the visions that Plato, Fourier, Skinner, and others contributed to the utopian canon. Contemporary critics of conventional living patterns generally have become less interested in reforming institutions *within* conventional households and more interested in improving social relations *among* neighboring households. Those who hunger for deeper social interactions, it is now thought, can satisfy their hunger beyond the walls of their dwellings. New Urbanists, a highly influential school of urban planners, feature conventional dwelling units in their communities, but seek to enhance contact among neighbors by, for example, including front porches and placing housing units close together.<sup>193</sup>

Even skeptics of liberalism seem to be mainly interested in enhancing inter-household, as opposed to intra-household, solidarity. Kennedy and Simon, for example, tout the potential of the limited equity housing cooperative.<sup>194</sup> Owner-occupants who buy units in one of these ventures must agree to sell back, on departure, their proprietary interest to the remaining co-owners at a below-market price. This heavy tax on exit can be expected to reduce owner-

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the common house only two or three times each week. Can you imagine 25 or more households each trying to separately prepare 18 or 19 meals a week in one kitchen? That would be well nigh impossible. So yes, each residence has a fully equipped—and usually spanking new—private kitchen. Really.

Cohousing Ass'n of the U.S., Frequently Asked Questions (FAQ), <http://www.cohousing.org/resources/faq.html#kitchen> (last visited Oct. 10, 2005).

192. Muir Commons, the first newly constructed co-housing development in the United States, opened in 1991 in Davis, California. KATHRYN MCCAMANT ET AL., *COHOUSING: A CONTEMPORARY APPROACH TO HOUSING OURSELVES* 208 (2d ed. 1994). By 2005 there were about eighty occupied developments, comprising among them some 2000 housing units. Cohousing Ass'n of the U.S., Cohousing Communities Directory, [http://directory.cohousing.org/us\\_list/all\\_us.php](http://directory.cohousing.org/us_list/all_us.php) (last visited June 20, 2006) [hereinafter Cohousing Community List]. Of the sixty-nine listed communities with reported completion dates, ten had been completed in 1991-1995, thirty-five in 1996-2000, and twenty-four in 2001-2005. *Id.* During 1991-2005, about 21 million new private housing units were produced in the United States. STATISTICAL ABSTRACT: 2006, *supra* note 4, at 619.

193. See, e.g., PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS* 65, 84 (1993); ANDRES DUANY ET AL., *SUBURBAN NATION* 205-07 (2000); Barbara B. Brown et al., *Neighbors, Households, and Front Porches: New Urbanist Community Tool or Mere Nostalgia?*, 30 ENV'T & BEHAV. 579 (1998) (reporting data on the use of front porches).

194. Kennedy, *supra* note 167; Simon, *supra* note 167, at 1361-66.

occupant turnover, thereby possibly enhancing solidarity among the cooperative's households.<sup>195</sup> It is notable, however, that Kennedy and Simon join with the New Urbanists and co-housing advocates in accepting the conventional household as their basic social building block. Similarly, feminist critics such as Martha Fineman and Vicki Schultz, who aspire to radically transform conventional husband-wife relations, seem not to be troubled by the prospect of a future in which small, intimate households continue to predominate.<sup>196</sup>

The central fact is that conventional households—small, typically family-based, and commonly owner-occupied—have predominated in the face of competition in widely diverse eras and sociolegal environments. Although small-bore public law policies, path dependence, and nonliberal ideologies undoubtedly can affect the shape of prevailing household institutions, particularly the incidence of homeownership, their influence on the sizing and composition of occupant groups tends to be either minor or ephemeral. The conventional kinship-based household persists not because individuals lack imagination or spurn interfamily solidarity but rather because this traditional form has inherent advantages. Even a weakly communal blueprint for dwelling and dining, such as co-housing, tends to founder on that most mundane of shoals: transaction costs. As the next three Parts demonstrate, transaction costs powerfully influence all features of household institutions, in particular the structuring of ownership, the numbers of participants, and participants' systems of internal governance.

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195. Demand for these communities is tepid. The owners of many former limited equity housing co-ops, including all four in the 4500-unit Co-op Village complex on Manhattan's Lower East Side, have voted to eliminate their resale-price ceilings. See Nadine Brozan, *For Co-op Complexes, Complex Choices*, N.Y. TIMES, Feb. 3, 2002, at J1; see also Kennedy, *supra* note 167, at 97 ("The private housing market does not generate a limited equity [cooperative housing] sector.").

196. Fineman urges the abolition of marriage as a legal category but proposes the conferral of special legal protections on participants in certain caregiver relationships, such as mother-child pairs, whose members in practice are highly likely to co-reside in a small household. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 8-9, 228-36 (1995). Schultz favors converting much currently unpaid household work performed by insiders to paid work performed by outsiders. See Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1900-02 (2000). Her discussions of ideal domestic relationships, however, typically assume the continued prevalence of small households headed by intimate partners. See, e.g., *id.* at 1957 n.305. But cf. *id.* at 1939 (suggesting, in passing, the desirability of creating more households that are not centered on a nuclear family).

## V. CHOOSING WHICH OF A HOUSEHOLD'S PARTICIPANTS SHOULD SERVE AS ITS OWNERS

The owners of a house—typically the grantees named in the most recent deed<sup>197</sup>—almost always are the people who provided the equity capital, i.e., the funds used to defray the portion of the purchase price not financed by means of debt capital provided by mortgage lenders. After initially acquiring title, these same grantees typically provide any additional infusions of equity, perhaps to cover deficits incurred in ownership operations or to finance improvements to the premises.<sup>198</sup> What are the powers of a household's owners? Why, among all the various parties involved in household operations, are contributors of equity capital (as opposed to, say, providers of labor) designated as owners? Transaction cost considerations lie at the heart of the story.

### A. *Basic Concepts in the Theory of the Ownership of Enterprise*

According to the theory of the firm, the owners of an enterprise have two key entitlements: the power to make residual control decisions and the right to receive residual financial flows.<sup>199</sup> These entitlements tend to be bundled together in a household, just as they are in a nondomestic enterprise.

#### 1. *Residual Control Decisions*

When Dad and Aunt Audrey acquired the Sitcom House, they assumed broad powers to decide the use of the premises, the people who could enter it, and the circumstances under which it might be transferred to another.<sup>200</sup> The owners of a household, however, commonly choose to trade or give away some of the sticks in the bundle of entitlements that they initially acquired. Although Nadia is not one of the owners of the Sitcom House, her agreement with Dad might explicitly entitle her both to dwell in the guestroom over the garage and to paint its interior in a color of her choice. Granny, through a process of gift

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197. See *supra* note 123 and accompanying text.

198. The donee of a dwelling conveyed as a gift (or the devisee of an inherited dwelling) initially invests nothing but typically does make later monetary infusions. When an owner has been exceptionally passive, the doctrine of adverse possession may confer title on a house's long-time occupants, including ones who previously had not contributed capital. Once adverse possessors obtain title, however, they are likely to become capital providers.

199. See PAUL MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION AND MANAGEMENT* 289-90 (1992) (lucidly explaining these notions).

200. See *supra* notes 30-32, 40 and accompanying text.

exchange with Dad and Aunt Audrey, might have acquired implicit rights to live rent-free in the Sitcom House. Young Chip might even charm Dad into ceding him control over whom to invite to an adult dinner party.

Owners' residual control powers are the ones that they originally acquired but have not yet traded or given away. If, as is almost certain, Dad and Aunt Audrey's express and implicit obligations to the various occupants are partial, they retain the power to decide many issues. Has the time arrived to charge Maureen rent or to ask her to find another home for Chip and herself? Can Nadia invite her lover to move in with her? Should a swimming pool be built in the back yard? If Aunt Audrey wants to withdraw her capital and Dad is willing to move to a smaller nest, has the time come to put the Sitcom House up for sale?

The owners of a household (in their roles as owners, as distinguished from other possible roles such as occupants or family members) are primarily interested in controlling household behavior that affects the value of their residual financial claims. For example, because Dad and Aunt Audrey incur opportunity costs when they cede space to an occupant, they are likely to want to assure themselves an adequate reciprocal flow of compensating benefits from that occupant. If they concluded that Granny, given her level of contributions to them as owners, already controlled *enough* space within the house, they would resist her attempts to take over the dining room table as a site for her jigsaw puzzles. Granny's choice of home reading material, by contrast, would not normally affect the value of the space that Dad and Aunt Audrey controlled. Their implicit lease with Granny thus would limit her use of the dining table, but not her choice of books.

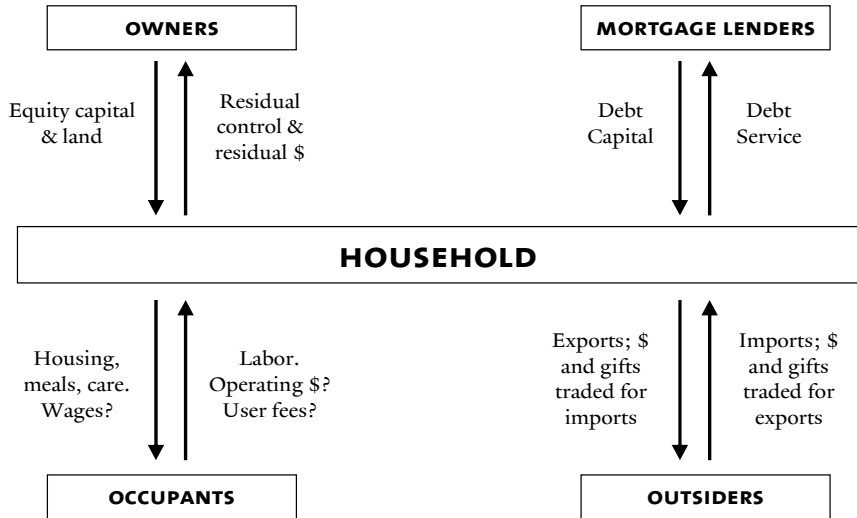
Or, suppose Maureen wants to bring a dog into the Sitcom House as a personal pet. Because the presence of the dog might negatively affect the residual value of the shared environment, Maureen certainly would have to obtain Dad's (and possibly Aunt Audrey's) approval. In this instance Dad and Maureen are enmeshed in three conceptually distinct relationships: father/daughter; co-occupant/co-occupant; and (implicit) landlord/tenant. The last of these relationships significantly boosts Dad's power to influence Maureen's dog decision. If Maureen herself were the sole owner of the Sitcom House, Dad's control over her choice of pets would plummet.

## 2. *Residual Financial Flows*

Figure 2 portrays the financial flows to and from the main participants in a household's economy. Entitlements to some of these flows may be governed by express contracts. For instance, a labor contract may establish the compensation owners are to pay a domestic worker; a lease, an occupant's

rental obligation to owners; and a mortgage, the owners’ financial obligations to a secured lender. In most households, entitlements to many internal flows are protected by household-specific norms that the members generate through repeated informal interactions.<sup>201</sup>

Figure 2.  
AN OVERVIEW OF THE HOUSEHOLD ECONOMY



As in a business firm, the residual financial flows in a household enterprise are the ones that remain unallocated after all existing commitments that govern inflows and outflows have been honored. The value of the owners’ equity in the household is the discounted present value of these residual flows.

3. *Ownership: The Amalgamation of Control and Financial Residuals*

The owners of a household, like the owners of any type of enterprise, typically have *both* the power to make residual control decisions and the right to receive residual financial flows. Scholars of business enterprise argue that the patrons of a firm benefit from the bundling of these two types of residual rights because this increases owners’ incentives for prudent management.<sup>202</sup>

201. See *infra* text accompanying notes 300-316.  
202. See, e.g., HANSMANN, *supra* note 86, at 11-12; MILGROM & ROBERTS, *supra* note 199, at 289-93.

To illustrate, suppose that the roof of the Sitcom House has begun to leak, an eventuality not governed by contract among the members, nor by norm, nor by housing code. If the owners of the household (Dad and Aunt Audrey) have residual control powers, they have the exclusive authority to decide whether and how to repair the roof, but also the burden of bearing the attendant costs. Reshingling the roof would be in the owners' financial interest only if the cost of the project would be exceeded by the increase in the discounted future occupancy value of the household premises. Generally, one who bears the financial consequences of a decision is likely to deliberate more carefully than one who does not bear those consequences. Bestowing on the owner of a household both residual control powers and residual financial claims thus tends to improve the quality of household decisions. This proposition, however, does not pinpoint *which* of the various providers of inputs into household operations should serve as owners.

*B. Why Suppliers of a Household's At-Risk Capital Tend To End Up Owning It*

*1. The Various Patrons Who Might Own a Household*

Like any enterprise, a household is associated with a variety of "patrons" (to borrow a useful term from Henry Hansmann).<sup>203</sup> Figure 2 identifies the four chief patrons involved in a typical household's economy. Two of these patrons—owners and occupants (together, the "members")—have been featured in the previous discussion. Owners contribute equity, either in cash (for instance, a down payment on a house) or in kind (for instance, a gift of previously acquired land). Occupants supply most household labor.<sup>204</sup> Figure 2 also indicates two other patrons who typically are sitting in the wings: mortgage lenders and outsiders. Lenders provide debt capital. Outsiders contract with owners or occupants to provide some goods and services—such as groceries and lawn-mowing—that are consumed within the household.

The patrons of a household combine their various inputs of labor, capital, land, and personal property to generate a flow of goods and services that includes, by definition, shelter and meals for occupants.<sup>205</sup> In a family

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203. Hansmann uses "patron" to describe any party who transacts with a business firm. HANSMANN, *supra* note 86, at 12. Robert Pollak has privately indicated a preference for "stakeholder."

204. A household's internal rules also may require occupants to help defray operating expenses and to pay user fees. Maureen, for example, might be obligated to contribute to the cost of groceries and to pay for her long-distance telephone calls.

205. See *supra* note 3 and accompanying text.

household, the range of services is likely to be especially broad and may include, among others, emotional and medical care, child training, and entertainment. Household members typically distribute most of these outputs to occupants, either as gifts or as obligations owed under the household's contracts, norms, and other rules.<sup>206</sup> Housemates also may export some household products to outsiders,<sup>207</sup> and may provide some household services to casual guests whom they have invited to share meals or accommodations. As noted, owners receive any residual outflows, whether cash or in kind.

Those jointly involved in an enterprise have an interest in allocating ownership rights to the category of patrons that values ownership most highly.<sup>208</sup> Conferring rights in this fashion reduces patrons' total costs of

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206. Love-infused households are sites of staggering amounts of altruistic gift-giving, especially between spouses, from parents to minor children, and from adult children to elderly parents. See, e.g., Gary S. Becker, *Altruism in the Family and Selfishness in the Marketplace*, 48 *ECONOMICA* 1 (1981). Many long-term cohabiting couples also end up making gifts that pool their financial assets. See Kornhauser, *supra* note 164, at 84-91 (reviewing empirical studies). Because an outside observer cannot easily distinguish between an altruistic gift and a gift made with the expectation of reciprocation, empirical analysis of domestic property rights is inherently difficult.

207. Prior to the Industrial Revolution and the emergence of the conception that the home and workplace were "separate spheres," most products were manufactured within households. See NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835*, at 35-39 (2d ed. 1997) (describing the shift of yarn-spinning from the home to the factory). Contemporary zoning ordinances, by contrast, commonly attempt to limit the operation of home businesses. See Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191 (2001). Nonetheless, advances in telecommunications have helped enable a significant fraction of the workforce to work at home for either outside customers or outside employers. See, e.g., U.S. CENSUS BUREAU, *HOME-BASED WORKERS IN THE UNITED STATES: 1997*, at 3 (2001), <http://www.census.gov/prod/2002pubs/p70-78.pdf> (estimating that 4.8% of the workforce works exclusively at home).

208. Splitting ownership rights among two or more classes of patrons generally is inadvisable. For example, if suppliers of both labor and capital were to share ownership of a household, transaction costs would escalate because both the number and the heterogeneity of the decision-makers would increase. See *supra* text accompanying notes 78-89. But cf. MARGARET M. BLAIR, *OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY* 238-74 (1995) (arguing that a corporate employee with firm-specific human capital merits a share of corporate ownership).

Passive investors in a small business enterprise sometimes are willing to reward, with a larger ownership share, a co-venturer willing to assume management duties. See, e.g., *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928) (involving an enterprise organized in this fashion). According to the traditional default rules of partnership law, however, when a partnership is dissolved, partners' contributions of capital are paid back before profits are distributed. UNIF. P'SHIP ACT §§ 18(a), 40(b) (1914). By analogy, equity investors in a house conceivably might grant an ownership share to an occupant who has promised to perform



obtaining needed factors of production. In addition, patrons benefit from allocating ownership in a manner that reduces the transaction costs of governing the enterprise. The suppliers of some factors, if not granted the protection of ownership rights, might insist on being protected with contractual guarantees that the participants would find costly both to draft and to administer. The selection of a governance system for a household (or any other enterprise) thus is a positive-sum game. All patrons, including nonowners, can maximize household surplus by minimizing the sum of (1) deadweight losses arising from suboptimal governance decisions, and (2) the transaction costs of governance.<sup>209</sup>

Of the various patrons, outsiders who trade with the household are the least plausible candidates to serve as owners. Because they rarely are knowledgeable about household conditions, they tend to be poorly qualified to make residual control decisions.<sup>210</sup> A mortgage lender similarly is likely to be poorly informed and usually can adequately protect itself against opportunism on the part of other patrons by obtaining a senior mortgage on the household premises and by limiting the amount of the loan.<sup>211</sup> Occupants, on the other

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future household labor. This sort of arrangement would be risky for capital providers, however, because the work might never be performed. When real estate is partitioned, there thus is a presumption that it is owned in shares proportionate to capital contributions. *See, e.g., Sack v. Tomlin*, 871 P.2d 298, 303 (Nev. 1994); *Spector v. Giunta*, 405 N.E.2d 327, 330 (Ohio Ct. App. 1978); *see also IHARA ET AL.*, *supra* note 88, at 6/17, 6/22-25 (offering form contracts that allocate ownership shares in proportion to equity contributions); *cf. id.* at 10/16 (advising that, at the time of breakup, an occupant who had contributed labor to make physical improvements to a house should be awarded compensation for that labor, but not an ownership share). *But see IHARA ET AL.*, *supra* note 88, at 6/21-22 (discussing the possibility of a contract conferring a share of house ownership in part on labor contributed to improve the house).

209. In Hansmann's terms, this is the "lowest-cost assignment of ownership." HANSMANN, *supra* note 86, at 21-22.
210. In addition, unlike providers of at-risk capital, outsiders typically have simple means of protecting themselves from opportunistic acts by other patrons. For instance, a disgruntled outsider who provides an ephemeral service can withhold future services, and a provider of a durable good or permanent physical improvement can insist on being either protected by lien or paid in advance.
211. Like a bondholder of a business corporation, a mortgagee can use both covenants and security interests to protect itself against household practices that would jeopardize repayment of the mortgage loan. The residual claimants of an enterprise that is fully leveraged may be tempted, especially if they would not be personally liable for losses, to invest in overly risky projects. If these projects were to succeed, these owners would reap all the gains, but if the projects were to fail, the owners would bear none of the losses. On the agency costs of 100% debt financing in the corporate context, *see HANSMANN*, *supra* note 86, at 53-56; and ROBERTA ROMANO, FOUNDATIONS OF CORPORATE LAW 120 (1993), which notes that "we do not see 100 percent debt-financed firms." Like a bondholder, a mortgage lender

hand, are facially plausible candidates to serve as the owners of a household insofar as they typically do have detailed knowledge of the enterprise. If occupants were to own a household, they conceivably could raise all the capital they needed by means of either loans (perhaps secured by junior mortgages) or retained earnings.<sup>212</sup>

## 2. *The Advantages of Conferring Ownership on Contributors of At-Risk Capital*

In practice, however, the patrons of households—even the patrons of the most idealistic intentional communities<sup>213</sup>—typically confer ownership (that is, rights to make residual control decisions and receive residual financial flows) on their suppliers of equity capital. The literature on the ownership of enterprise suggests four basic reasons for this result. In order of increasing complexity and weightiness, they are:

*Equity investors in households tend to be few in number and stable in identity.* The providers of a household's equity capital are likely to be less numerous than its occupants. The Sitcom Household, for instance, has four adult occupants, but only two suppliers of equity. Two people can make decisions more easily than can four. Although these particular numbers are no more than artifacts of a hypothetical case, ownership clusters in fact tend to be smaller than occupant clusters. As mentioned, about 90% of the private housing units in the United States are entirely owned by either one or two individuals (in the latter case, typically a married couple).<sup>214</sup> By empowering a smaller number of equity contributors to govern, a multi-occupant household can reduce its decision-making costs without forgoing economies of scale in household production and consumption.

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desires to ensure that a borrower has an equity stake sufficiently large to deter the borrower from taking excessive risks with the mortgaged property. The loan-to-value ratio of a first mortgage thus rarely exceeds 80% (absent government or private mortgage insurance). See GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 11.2, at 850 (4th ed. 2001). In addition, the higher the total loan-to-value ratio, the more closely the most junior mortgage lender is likely to monitor the behavior of the mortgage borrower.

212. Scholars of business organization have analyzed the analogous possibility of a worker-owned business firm that borrows all needed capital. See, e.g., HANSMANN, *supra* note 86, at 75-77. And there indeed are some instances of enduring worker ownership. See, e.g., G. Mitu Gulati et al., *When a Workers' Cooperative Works: The Case of Kerala Dinesh Beedi*, 49 UCLA L. REV. 1417 (2002).

213. See *infra* notes 222-226 and accompanying text.

214. See *supra* notes 123-132 and accompanying text. Compare the figures on the sizes of co-occupant clusters *supra* p. 255 tbl.1.

In addition, equity investors in a household tend to turn over less frequently than household occupants do.<sup>215</sup> Even in an owner-occupied nuclear family household, peripheral occupants such as Nadia the au pair are likely to come and go, and so might some individual family members such as Granny. The list of occupants of a large, non-family household is likely to be even more unstable. To avoid the complexities of absentee ownership by former occupants, a departing occupant might be required to transfer his ownership interest either to a successor occupant or to sell it back to the remaining occupants.<sup>216</sup> The negotiation of those transfers, however, would significantly increase the transaction costs of beginning or ending a period of occupancy in a particular dwelling. Unless scrupulously recorded on public records, a revolving door of occupant-owners also would confuse vendees, contractors, mortgage lenders, tax collectors, and other outsiders in need of assurance about the current state of title to a household premises. By adding to transaction costs, occupant ownership thus is likely to disadvantage all of a household's patrons.

*Suppliers of capital tend to bear risks better than suppliers of labor do.* A risk-averse person is helped by the diversification of her combined holdings of human capital and financial capital. An occupant who has specialized and nontransferable skills in housework already is somewhat invested in the dwelling she occupies. Particularly if she has little financial capital, for reasons of diversification she may prefer not to have a share of the ownership of the residual financial claim in the same dwelling. Other less risk-averse patrons of the same household also likely would not want her to serve as an owner. For example, if Granny and Nadia were co-owners of the Sitcom House and neither had much in the way of savings, they might be overly cautious about taking on more household debt to finance the replacement of the leaking roof. If Aunt Audrey, another co-owner, had a larger and more diversified financial portfolio, she would be less wary of the downside risk of the roof project and

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215. In 1999-2000, 31% of the residents of rental units, and 9% of residents of owner-occupied housing units, had moved to their present dwelling during the course of the past year. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, at 28 (2001). In 1999, 7% of existing single-family dwellings, detached and attached, were sold to a new set of owners. (This figure is computed from data reported in *id.* at 599, 604.) The turnover rates of both investors and occupants, of course, are probably not entirely independent of their rights of ownership.

216. An occupant's ownership rights conceivably could be usufructuary, that is, limited to the time period of personal occupation. The obvious drawback of that system, however, is that an occupant about to depart likely would adopt an overly shortsighted perspective on a management decision with long-term consequences, such as whether a roof should be replaced.

therefore annoyed by their excessive caution.<sup>217</sup> This narrow point leads to a more general one.

*The interests of suppliers of capital tend to be more homogeneous than the interests of occupants.* Hansmann stresses the transaction cost advantages to conferring ownership on persons whose interests are homogeneous.<sup>218</sup> The interests of suppliers of equity capital to a household typically are more homogeneous than are the interests of the household's occupants (whether in their capacities as consumers of domestic services, suppliers of domestic labor, or both). For example, Dad and Aunt Audrey, in their capacities as equity investors, have similar financial stakes in any roof repair project that might be undertaken.<sup>219</sup> This would reduce their decision-making costs.

A roof repair project, by contrast, would affect occupants in different ways. The construction activity might inconvenience some occupants more than others. Moreover, the occupants of bedrooms that previously had been particularly vulnerable to roof leaks would obtain special benefits from the repair. If occupants, and not capital providers, controlled the decision over whether to replace the roof, these differences might cause fractiousness.

In addition, homogeneity of ownership interests facilitates the calculation of shares of ownership. Capital contributions are especially easy to value. Although some account may have to be made of the time at which a contributor provided capital, figuring out the shares of a household's equity capital is likely to require no more than simple mathematical calculations. This is not the case for labor inputs, for which difficult valuation problems loom. If labor were the residual claimant in the Sitcom Household, for example, the occupants might wrangle over the fractional interests that, say, Maureen and Granny should be accorded. According each occupant an equal share of ownership would greatly reduce these transaction costs, but it also would misalign incentives by failing to correlate ownership shares with work contributed.

*Because suppliers of at-risk capital are those most vulnerable to opportunism, they value rights of control more than others do.* Suppliers of at-risk capital to a household are especially vulnerable to opportunism by other patrons. In a

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217. Hansmann regards risk-bearing considerations as a relevant, but often exaggerated, influence on ownership forms. See HANSMANN, *supra* note 86, at 44-45, 57.

218. *Id. passim.*

219. Dad's role as an occupant as well as a partial owner, however, could give rise to complications. If Dad were occupying the Sitcom House at a favorable (implicit) rent, he personally would reap more benefits from the repair than Aunt Audrey would. In addition, Dad's particular interest in, for example, the bedroom he occupies conceivably might influence his evaluation of roof repair alternatives.

liberal society, a household worker who feels exploited can exit immediately with most of her human capital in tow.<sup>220</sup> A supplier of debt capital can insist on the protection provided by a senior security interest, and outside suppliers of goods and services can insist on simultaneous bilateral exchange. A supplier of at-risk capital, by contrast, turns over a long-lived asset that opportunistic household managers could either expropriate or expose to unduly high risks, say, by skimping on maintenance or taking in pets with destructive tendencies. Oliver Williamson argues that transaction costs prevent nonowner providers of at-risk capital to business firms from negotiating contracts that adequately protect them from these sorts of risks.<sup>221</sup> Similarly, the various patrons of a household enterprise are likely to recognize that the approach that would best minimize their overall costs would entail bestowing ownership on those among them who are equity investors.

The founders of intentional communities, although not conventionally associated with capitalistic practices, typically have implicitly recognized the advantages of conferring ownership on providers of capital. Even during the height of the idealistic Woodstock era, the modal form of land ownership in a rural commune in the United States was ownership by one or a few members, with corporate ownership the next most common form.<sup>222</sup> Contemporary advocates of co-housing urge that the new communities be organized, at least initially, as limited liability corporations, with shares allocated in proportion to investments made.<sup>223</sup> Indeed, it is difficult to find a single instance of worker ownership of an intentional community. Ownership by a trust, however, is a

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220. However, household-specific human capital, such as knowledge about how to deal with a particularly cranky oven or neighbor, is not portable.

221. Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1210 (1984).

222. ZABLOCKI, *supra* note 23, at 64-65, provides a breakdown of the ownership forms present in the sample of rural and urban communes that he studied in 1965-1978. Zablocki found that, of the communes that didn't rent their premises, the most prevalent form was "[o]wner[ship] by one or a few members," followed by "[c]orporate ownership." *Id.* at 64 tbl.2-3. Zablocki does not indicate, however, whether the shares in corporate communes were owned solely by equity investors or by others as well. *Id.* A legal advisor to creators of contemporary intentional communities urges them to take title to land in the name of a nonprofit corporation, partnership, or limited liability corporation. See Rob Sandelin, *Legal Issues for Communities: A Primer* (1997), <http://www.ic.org/nica/Legal/Legal1a.html>; see also CARL J. GUARNERI, *THE UTOPIAN ALTERNATIVE: FOURIERISM IN NINETEENTH-CENTURY AMERICA* 159-61 (1991) (stating that many Fourierist phalanxes were organized as joint-stock companies); KARL A. PETER, *THE DYNAMICS OF HUTTERITE SOCIETY: AN ANALYTICAL APPROACH* 178 (1987) (reporting that Hutterite communities usually hold their land in corporate form).

223. See SCOTTHANSON & SCOTTHANSON, *supra* note 87, at 167-78, 269. After completion, the owners sometimes reorganize themselves into a condominium association (a form controlled by investors, not occupants). *Id.* at 170-71.

form that might serve occupants' interests, provided that the trustees were so instructed.<sup>224</sup> Real estate indeed has been held in trust form at some rural U.S. communes, including, apparently, Brook Farm during its early years.<sup>225</sup> Governance by trustees, however, may be in tension with the participatory democracy that communards tend to favor. In addition, as Williamson would predict and the history of Brook Farm indeed illustrates, the trustees of an intentional community are likely to have a devilish time raising capital.<sup>226</sup>

In any cultural context, by contrast, investor ownership of dwellings offers decisive transaction cost advantages. Several millennia ago, the creators of conventional households began to refine this system of equity ownership, and it soon became predominant in the domestic sector.<sup>227</sup> In subsequent historical periods the promoters of commercial enterprises could readily transplant the model to the field of business.

## VI. THE MIXED BLESSINGS OF JOINING WITH OTHERS

Although most adults strive to avoid unwieldy households, most also choose not to live and own alone. This Part addresses the factors that influence how many people join together in the various household relationships and, in the case of co-occupants, what activities they choose to undertake.

### A. Adding Co-Occupants

Like the owners of a business firm, the members of a household can gain by assembling a team of optimal size and assigning to that team activities of

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224. See ZABLOCKI, *supra* note 23, at 64-65 (arguing that the trust form best assures that the ideals of a community's founders will be respected).

225. Brook Farm's assets initially were vested in an unconventional association directed by four trustees, which borrowed capital from a separately organized joint-stock company. See DELANO, *supra* note 181, at 68-72, 97. Delano mentions that these trustees were elected annually, but does not identify who the electors were. See *id.* at 68; see also ZABLOCKI, *supra* note 23, at 64 (reporting that trusts owned the sites of 12% of the rural communes in his Woodstock-era sample).

226. Nathaniel Hawthorne, one of the original investors in the Brook Farm joint-stock company, eventually sued for the return of his investment. See DELANO, *supra* note 181, at 249-50, 263, 361 n.27. Brook Farm's organizers were perennially short of working capital. See *id.* at 96-97, 184-85, 413 n.11. In 1845, the legal conversion of the community into a "phalanx," structured as a more conventional corporation, prompted new infusions of equity. *Id.* at 207.

227. See Ellickson & Thorland, *supra* note 99, at 337-38, 355-57 (citing sources on household organization in ancient Mesopotamia, Egypt, and Israel).

optimal scope.<sup>228</sup> Boosting the number of household occupants, for example, may reduce the per capita costs of providing goods and services such as heating, informal social insurance, and food.<sup>229</sup> On the other hand, adding occupants may give rise to countervailing inefficiencies of scale, such as greater difficulty in governing behavior within the home. In addition, as the number of housemates rises, an individual occupant is likely to suffer losses in personal autonomy and privacy. A person who lives alone has broad control over the music played, the food served, and the guests invited. Those who live with others, by contrast, must make compromises.<sup>230</sup> And the more housemates one has, the less secure the information about one's sexual partners, medical problems, and eccentric tastes. As a result of these countervailing considerations, over 90% of adult Americans residing in non-family households forgo the advantages of size and live either alone or with only one other adult.<sup>231</sup>

Like managers of a firm, occupants of a household, whatever their number, repeatedly confront make-or-buy decisions.<sup>232</sup> Instead of cooking their own meal on a given evening, for example, occupants can go out to a restaurant or arrange for a meal to be delivered to their home by an outside vendor.<sup>233</sup> Putting the transaction cost implications of the alternative choices to one side, housemates incur deadweight losses when they choose the more costly production alternative. Typically, this consideration weighs in favor of buying from outsiders because labor and capital are unlikely to be as specialized within a home as they are within the economy at large. Considerations of transaction costs, on the other hand, usually favor home production; dealing with outsiders tends to be more complex than dealing with insiders, and home

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228. Economists have produced a deep literature on many of the relevant issues. See, e.g., REID, *supra* note 1; Reuben Gronau, *Home Production—A Survey*, in 1 HANDBOOK OF LABOR ECONOMICS 273 (Orley Ashenfelter & Richard Layard eds., 1986).

229. See Edward P. Lazear & Robert T. Michael, *Family Size and the Distribution of Real Per Capita Income*, 70 AM. ECON. REV. 91, 97 (1980) (noting efficiencies of scale in food provision).

230. See Melinda Ligos, *Wanted: Roommate, as Economic Necessity*, N.Y. TIMES, Aug. 24, 2003, § 3 (Business), at 8 (presenting a litany of complaints by owner-occupants who had taken in boarders). But cf. Penelope Green, *5 New Roommates Play 'Getting To Know You,'* N.Y. TIMES, July 10, 2005, § 11 (Habitats), at 4 (describing how five single adults ages twenty-three to thirty-six, most of them newcomers to the New York City area, had located each other on Craigslist, an online classified advertising site, and then co-occupied an apartment in midtown Manhattan mostly for social reasons).

231. See *supra* p. 256 tbl.2.

232. See REID, *supra* note 1, at 219–23 (presciently discussing this topic).

233. On patterns of domestic outsourcing, see Esther de Ruijter et al., *Trust Problems in Household Outsourcing*, 15 RATIONALITY & SOC'Y 473 (2003), and sources cited therein.

production commonly enables savings in transportation costs, such as the hassle of group travel to a restaurant. Coase's theory of the firm implies that, when choosing whether to make or buy, decision-makers strive to minimize the sum of the deadweight losses and transaction costs they incur.<sup>234</sup> Because transaction costs tend to be lower in intimate households, Coasean theory thus anticipates that five co-occupying adults who were intimates would share home-cooked meals more frequently than another fivesome who were not. Intimates would dine together at home not only because they are apt to especially enjoy each other's company but also because they can more efficiently coordinate home production.

Particularly during the past century or two, the median number of household occupants has fallen sharply.<sup>235</sup> In addition, even controlling for size, household occupants have been shifting away from internal production and toward acquiring goods and services through trade with outsiders. A few centuries ago, a household's occupants were likely to grow much of their own food, make much of their own clothing, and erect their own dwellings. A twenty-first-century household in a developed nation, by contrast, is far less self-sufficient ("autarkic" is the fancy synonym).<sup>236</sup>

Demographic and technological changes plainly have contributed to the downsizing of household economies. The leap in life expectancies during the twentieth century, for example, served to lower the average size of co-occupant groups. Particularly in a prosperous society, parents are far more likely to live with their minor children than with either their adult children or their own parents. As minor children make up an ever smaller share of the total population, average household size therefore drops.<sup>237</sup> Technological innovations such as the motor vehicle and the telephone also tend to tip housemates away from internal production because they reduce the transaction

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234. See Coase, *supra* note 15.

235. See *supra* notes 91-93 and accompanying text.

236. According to one estimate, between 1930 and 1985, the output of households in the United States fell from 73% to 28% of the output of the external market sector. John Devereux & Luis Locay, *Specialization, Household Production, and the Measurement of Economic Growth*, 82 AM. ECON. REV. 399, 402 (1992). But see Oli Hawrylyshyn, *The Value of Household Services: A Survey of Empirical Estimates*, 22 REV. INCOME & WEALTH 101, 124-28 (1976) (asserting that home production's share of the national economy decreased only modestly during the first three-quarters of the twentieth century).

237. On the influence of other demographic changes, such as urbanization, the rate of divorce, and average age at first marriage, see, for example, U.S. CENSUS BUREAU, *AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003*, at 5-6 (2004), available at <http://www.census.gov/prod/2004pubs/p20-553.pdf>; and Lawrence L. Santi, *Change in Structure and Size of American Households: 1970 to 1985*, 49 J. MARRIAGE & FAM. 833 (1987).



costs of trading with outsiders more than they reduce the transaction costs of internal coordination.<sup>238</sup> In addition, privacy and autonomy within a home are superior goods, that is, conditions that individuals who have become wealthier as a result of technological advances are apt to spend a greater fraction of their disposable income to attain.<sup>239</sup> As the United States became more prosperous during the twentieth century, for example, the percentages of single adults ages twenty to twenty-nine living with their parents, and of single elderly persons living with their children, both fell sharply.<sup>240</sup>

Changes in background legal conditions also can influence the size and scope of household enterprises. Households tend to be smaller in societies where norms and law provide effective support for the core liberal entitlements of private property, freedom of exit, and freedom of contract. Historically, the illiberal societies that have tolerated slavery have given rise to relatively large households; this is a natural consequence of empowering the master of a household to bring in and keep occupants against their will. Similarly, the emancipation, both legal and informal, of wives and adult children from the clutches of a *paterfamilias* has helped to open households' exit doors.

In addition, the establishment of the rule of liberal law and norms, especially over a wide territory, facilitates trade between household occupants and outside vendors. The more strongly these liberal conditions enroot themselves, the easier it is for occupants of households to negotiate and enforce

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238. Technological innovations also promote specialization of labor. This disfavors home production because highly specialized skills typically are more valuable when sold in the external labor market than when applied around the house. See Luis Locay, *Economic Development and the Division of Production Between Households and Markets*, 98 J. POL. ECON. 965 (1990) (attributing the shift away from household production mainly to economies of scale in firm production).

239. RICHARD A. POSNER, *OVERCOMING LAW* 536 (1995).

240. See Michael J. Rosenfeld & Byung-Soo Kim, *The Independence of Young Adults and the Rise of Interracial and Same-Sex Unions*, 70 AM. SOC. REV. 541, 548-49 (2005) (reporting that in 1940, about 70% of single adults in their twenties were living with their parents, compared to about 40% in 2000). In 1900, 72% of retired men over age sixty-five were living with either one of their children or another family member (not counting a wife). By 1990, this percentage had plummeted to 19.8%. DORA L. COSTA, *THE EVOLUTION OF RETIREMENT: AN AMERICAN ECONOMIC HISTORY, 1880-1990*, at 108, 130 (1998). Costa investigates whether this change was driven more by increased demand (i.e., senior men's preferences for greater privacy and autonomy) or by reduced supply (i.e., children's diminished generosity toward elderly fathers). She concludes that seniors' quest for privacy has been the main driving force. See *id.* at 114-30; see also RICHARD A. POSNER, *AGING AND OLD AGE* 285-86 (1995) (noting the desire of many seniors not to be a burden on their children); Ruggles, *supra* note 110 (discussing historical trends in living arrangements of the elderly).

contracts with outsiders.<sup>241</sup> And as contracting of this sort spreads, social capital and trust deepen, further facilitating outside trade.<sup>242</sup> By making “buy” options more attractive relative to “make” options, liberalizing trends thus tend to reduce both the number of household occupants and the scope of household production.

Events in ancient Greece and medieval England illustrate these points. Although slavery remained well ensconced during Greece’s Classical period, the *polis* matured into a more effective governing institution. Many of the early Greek city-states succeeded in improving the local trading environment, for example, by bringing law and order to the surrounding territory and providing a public marketplace (the much-celebrated *agora*). By Aristotle’s time, Athenians were active shoppers and their households had fewer occupants and were less autarkic than the households of the Homeric era.<sup>243</sup>

English noble households became gargantuan during the late Middle Ages. The average number of occupants in an earl’s household rose from around 35 in 1250 to about 200 by the late 1400s, with some households then having as many as 500 residents.<sup>244</sup> The occupants typically included the noble’s immediate family, friends and retainers who assisted in entertaining, and a multitude of hired servants. The resident staff produced many of the goods and services consumed on the premises, including communal meals, defense against marauders, religious ceremonies, arbitration of disputes, and education.<sup>245</sup> According to Kate Mertes, noble households expanded in size during a period when England was politically unstable and lacked centralized control.<sup>246</sup> After 1485, the King, Parliament, and royal courts gradually became

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241. See ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993) (stressing the importance, for economic development, of the presence of civic associations based on horizontal social ties); Pollak, *supra* note 1, at 593–94 (noting advantages of family production in low-trust environments).

242. See generally Joel Sobel, *Can We Trust Social Capital?*, 40 J. ECON. LITERATURE 139 (2002) (reviewing literature on social capital).

243. See VIRGINIA J. HUNTER, *POLICING ATHENS: SOCIAL CONTROL IN THE ATTIC LAWSUITS*, 420–320 B.C., at 78 (1994) (noting the responsibility of slaves to do the “shopping”); see also *supra* text accompanying notes 103–106 (discussing the downsizing of the ancient Greek household).

244. See KATE MERTES, *THE ENGLISH NOBLE HOUSEHOLD 1250–1600: GOOD GOVERNANCE AND POLITIC RULE* 185–88 & app. C (1988); see also C.M. WOOLGAR, *THE GREAT HOUSEHOLD IN LATE MEDIEVAL ENGLAND* 9–16, 39 (1999).

245. Yet even these huge households were far from autarkic. Their financial records reveal incessant purchases of wines, foodstuffs, and other supplies and services from outside vendors. See MERTES, *supra* note 244, at 102–20.

246. *Id.* at 185–87. Mertes also attributes the rise to a noble’s increased ability to administer a feudal domain from a central place and to statutory changes that made appointment to a

better at providing defense, adjudication, and other public goods. As England stabilized, noble householders were able to trade more easily with outsiders. Over the course of the next centuries, the scale and scope of earls' household economies shrank steadily.<sup>247</sup>

### B. Adding Co-Owners

Issues of the optimal scale of a dwelling's ownership associations are distinct from the analogous issues for occupancy associations. An owner—that is, a provider of at-risk capital—can foresee both advantages and disadvantages to joining with other investors. Co-ownership facilitates the diversification of risk and the pooling of capital, perhaps enabling, for example, two young single professionals to purchase a dwelling unit in an expensive housing market.<sup>248</sup> The primary downside of bringing in more co-owners, of course, is the escalation of transaction costs. The owners of a dwelling unit regularly confront decisions about matters such as repairs and improvements, dealings with tenants (paying or nonpaying), and payment of insurance and property tax bills, and they have an interest in being able to resolve them expeditiously.<sup>249</sup>

For prospective owners, reducing the transaction costs associated with the ownership relationship typically dominates other concerns. Although a homebuyer theoretically could bring in an outside investor as a co-owner to raise funds for a down payment, in the United States, only 4% of owner-occupants of dwellings choose to co-own with a nonoccupant.<sup>250</sup> Even the largest of apartment complexes are more likely to be owned in partnership than

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position within the household a noble's preferred method of compensating a loyal follower.  
*Id.*

247. See *id.* app. C.

248. See Jim Rendon, *Splitting the Cost of Buying a House*, N.Y. TIMES, July 11, 2004, § 11 (Real Estate), at 1.

249. On the headaches that can arise when two or more married couples share ownership of a vacation home, see Joanne Kaufman, *A House Divided: Perils of Co-Ownership*, N.Y. TIMES, Aug. 9, 2002, at F1.

250. See *supra* text accompanying note 134. In over 80% of the instances in which some owners were not occupants, the absentee owners did not bear any ongoing ownership costs. AMERICAN HOUSING SURVEY: 1999, *supra* note 90, at 76. But cf. ANDREW CAPLIN ET AL., HOUSING PARTNERSHIPS: A NEW APPROACH TO A MARKET AT A CROSSROADS (1997) (urging the sale of home equity to non-occupying limited partners).

in corporate form.<sup>251</sup> In short, most owners, like most occupants, are hesitant to bring in more co-participants.<sup>252</sup>

Ambient norms and small-bore legal rules may shape individuals' decisions about how many co-owners to have. During the twentieth century, for example, the social norm governing how a married couple should take title to their marital home shifted away from the husband taking title solely in his name and toward both spouses taking title as co-owners.<sup>253</sup>

### C. Choosing Between Owning and Renting a Home

Economists have amassed a large body of work on residential tenure choice.<sup>254</sup> This literature identifies some advantages of renting. To begin with, occupants unable to raise funds for a down payment to purchase a dwelling have no other option.<sup>255</sup> Occupants who do have sufficient savings nevertheless may still prefer to rent in order not to tie up a large chunk of their capital in an illiquid and undiversified investment.<sup>256</sup> Also, because renting involves smaller stakes, occupants usually can both commence and terminate a home rental

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251. See *supra* text accompanying note 132.

252. The popularity of timeshare projects, each of which can have myriad nominal owners, is puzzling. A well-marketed timeshare development taps into a buyer's anticipated delight in feeling that he *owns*, or at least will be able to brag that he *owns*, a share of a dwelling unit in a prestigious location, even though the buyer can't control the furnishing of that unit and will have a difficult time selling his interest in it. The administrative clumsiness of the timeshare form has provoked some critics to question its quality as an investment. See, e.g., J. Robert Taylor, *Timeshare Ownership Equals Disaster*, PALO ALTO WKLY. ONLINE EDITION, Nov. 11, 2005, [http://www.paloaltoonline.com/weekly/morgue/2005/2005\\_11\\_11.taylor11.shtml](http://www.paloaltoonline.com/weekly/morgue/2005/2005_11_11.taylor11.shtml); see also Stephen J. Nelson, Timesharing 101: A TUG Introduction to Timesharing (Nov. 2000), [http://www.tug2.net/advice/TimeShare-101.htm#\\_The\\_resale\\_market](http://www.tug2.net/advice/TimeShare-101.htm#_The_resale_market) ("As a rough guide, resale prices more closely reflect the cost of the unit absent the sales and marketing program, or roughly 50 percent of the new sales price."). See generally Curtis J. Berger, *Timesharing in the United States*, 38 AM. J. COMP. L. (SUPPLEMENT) 131 (1990).

253. See *supra* text accompanying notes 126-127.

254. See, e.g., Hansmann, *supra* note 165, at 30-39; J.V. Henderson & Y.M. Ioannides, *A Model of Housing Tenure Choice*, 73 AM. ECON. REV. 98 (1983).

255. In one survey, 51% of renters stated that they were tenants primarily because they couldn't afford to buy. David P. Varady & Barbara J. Lipman, *What Are Renters Really Like? Results from a National Survey*, 5 HOUSING POL'Y DEBATE 491, 501 (1994).

256. See HANSMANN, *supra* note 86, at 201-02; Mark A. Wolfson, *Tax, Incentive, and Risk-Sharing Issues in the Allocation of Property Rights: The Generalized Lease-or-Buy Problem*, 58 J. BUS. 159 (1985).

more rapidly and cheaply than a home purchase.<sup>257</sup> For those who put a high value on ease of residential mobility, this is a significant plus.

Although housing historically has not been a source of abnormally high investment returns, buying a home certainly can be advantageous on balance.<sup>258</sup> The Internal Revenue Code confers on homeowners a variety of significant income tax benefits.<sup>259</sup> The main inherent advantage of homeownership, however, is that it greatly eases coordination of domestic life. An owner of land has plenary (although not unlimited) power to control, into the indefinite future, both the use of the property and who is present on it. A landlord, when entering into a lease with a residential tenant, retains a reversion that becomes possessory when the lease ends. As a result, absent rent controls, a tenant lacks security of tenure beyond the term of the lease. In addition, even during the rental period, the provisions of the lease are likely to limit a tenant's control over both the physical condition of the premises and the identities of additional occupants. People who place a high value on long-term security of possession and on autonomy of control thus have good reason to own, not rent.

Transaction costs underlie this key advantage of buying a home. If transaction costs were zero, an occupant, regardless of whether he started out as an owner or renter, would end up exercising an identical set of possessory entitlements. An occupant who started out with only a short-term lease, for example, would be able to continually renegotiate with the landlord to extend the term of possession as long as that occupant continued to be the person who valued possession of the premises most highly. When he ceased being the most highly valuing possessor, he would depart. This departure date would be identical to the departure date that he would have selected were he to have owned the premises from the outset. In a zero-transaction-cost world, in short, purchasing a home would not increase security of tenure.

The economic literature on tenure choice recognizes, if indirectly, that a key advantage of homeownership is its capacity to reduce the transaction costs of coordinating domestic life.<sup>260</sup> When a home is owner-occupied, there still is an

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257. See Michael J. Lea & Michael J. Wasylenko, *Tenure Choice and Condominium Conversion*, 14 J. URB. ECON. 127, 135 (1983).

258. Investments in residential real estate generally do not generate exceptional returns. See ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE* 11-27 (2d ed. 2005) (asserting that U.S. home prices increased, in real terms, only 0.4% per annum between 1890 and 2004).

259. See sources cited *supra* note 165. These tax benefits may be partially capitalized into higher purchase prices.

260. See especially Henderson & Ioannides, *supra* note 254, at 99-102, discussing the "fundamental rental externality" that is rooted in a landlord's difficulties in monitoring a

implicit landlord-tenant relationship between the owners and the occupants, but that relationship typically involves intimates.<sup>261</sup> An arms-length landlord-tenant relationship, by contrast, is apt to be far less trusting during midgame and is especially rife with possibilities for opportunism in endgame—a stage that many intimates anticipate never even reaching. In the real world, where the transaction costs of achieving mutually beneficial outcomes are positive, a tenancy between relative strangers is inherently messier than homeownership.

An example helps clinch the point. Suppose that a sitting tenant wished both to extend the term of his lease and also to persuade the landlord to install new kitchen cabinets. The landlord and tenant would be situated as bilateral monopolists who could deal only with one another.<sup>262</sup> If opportunistic, the landlord, aware that the tenant had put down roots and faced positive moving costs, might insist on extortionate terms. The two parties then might engage in protracted wrangling or fail to exploit their potential mutual gains from trade. These unlovely scenarios would be far less likely to play out in a relationship among intimates.

The transaction cost advantages of eliminating the arms-length landlord-tenant relationship have enhanced the popularity of condominium housing. Beginning in 1961, state legislatures explicitly validated the condominium form, thereby reassuring mortgage lenders and title insurers, two actors highly attentive to obscure provisions of small-bore private law. Congress also provided a boost by extending to condominium owners the standard tax advantages of homeownership. Condominium projects then blossomed.<sup>263</sup> Henry Hansmann, one of the most perceptive analysts of institutional forms, persuasively argues that a large association controlled by occupants typically is less adroit at governing the common elements of a multifamily structure than a landlord with hierarchical power.<sup>264</sup> He concludes that the condominium form thus is inefficient for a large apartment building. In his view, developers choose this means of governance partly out of fear of rent control but mainly to enable

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tenant's use and maintenance decisions. Later works that pursue this theme include Joseph T. Williams, *Agency and Ownership of Housing*, 7 J. REAL EST. FIN. & ECON. 83, 84, 90 (1993), which finds, as numerous others have, that owner-occupied houses are better maintained than rented houses, and Wolfson, *supra* note 256, at 163-65.

261. Owner-occupancy can be analogized to vertical integration within a firm.

262. HANSMANN, *supra* note 86, at 197-99.

263. The full history is narrated in Hansmann, *supra* note 165, at 28-30, 61-62.

264. See HANSMANN, *supra* note 86, at 195-223. Association members are more numerous, and they also have heterogeneous interests when the alteration of a specific common area would particularly affect adjacent units.

their purchasers to enjoy tax subsidies.<sup>265</sup> This analysis, however, undervalues the transaction cost savings that the condominium form makes possible, namely, the elimination of the landlord-tenant relationship with regard to the interiors of individual condominium units.<sup>266</sup> To return to the prior example, an owner-occupant of a condominium unit can arrange for the installation of custom-designed kitchen cabinets far more easily than can a residential tenant. In some contexts, these savings in internal governance costs could more than offset the transaction cost disadvantages that Hansmann associates with collective governance of a building's common areas.<sup>267</sup>

Although small-bore legal policies can modestly influence household sizes,<sup>268</sup> the history of the condominium form illustrates that they can greatly influence residential tenure choices. The homeownership rate in Ireland (80%) is twice that in Sweden<sup>269</sup> in part because of differences between the two nations' legal policies.<sup>270</sup> Legislative debates over bills that would affect

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265. See Hansmann, *supra* note 165, at 56, 63, 67-68.

266. *But cf. id.* at 32-33 (discussing difficulties between landlords and tenants that might arise out of "lock-in" and "moral hazard"). A cooperative housing association, unlike a condominium association, typically takes out a loan secured by a blanket mortgage encumbering the interiors of members' dwelling units. As a result, the governing board of a housing cooperative is apt to monitor changes in unit interiors, thereby increasing the transaction costs of building governance. This may partly explain why condominium units tend to command higher sales prices than co-op units do. See Allen C. Goodman & John L. Goodman, Jr., *The Co-op Discount*, 14 J. REAL EST. FIN. & ECON. 223, 232 (1997) (finding a condominium premium of 12%).

267. Commercial condominium complexes are far less common than residential ones. This suggests that federal income tax considerations, which favor the purchase of a residence and the rental of commercial space, typically outweigh the transaction cost considerations discussed in the text. In addition, commercial leases tend to have much longer terms than residential leases do. See GEORGE LEFCOE, *REAL ESTATE TRANSACTIONS* 850 (5th ed. 2005) (indicating that many commercial leases have terms of from five to twenty-five years). A commercial tenant with a long-term lease and broad authority to install and remove trade fixtures may have little concern about possible entanglements with the landlord over improvements. *Cf.* Hansmann, *supra* note 165, at 64-67 (discussing reasons for the paucity of commercial condominiums).

268. For further elaboration, see *supra* text accompanying notes 161-165 and the text following note 196.

269. See *supra* note 136.

270. Between 1965 and 1974, the government of Sweden, a nation of roughly 4 million households, supervised the construction of 1 million housing units (the "Million Programme"), a majority of which were subsidized apartments. See Christopher Caldwell, *Islam on the Outskirts of the Welfare State*, N.Y. TIMES MAG., Feb. 5, 2006, at 55, 56; Wikipedia, *Million Programme*, [http://en.wikipedia.org/wiki/Million\\_Programme](http://en.wikipedia.org/wiki/Million_Programme) (last visited Sept. 1, 2006). ANGEL, *supra* note 93, at 330-39, finds that a nation's rate of homeownership is negatively correlated with the magnitude of its welfare expenditures. See

residential tenure choices tend to be politically charged because, after becoming a homeowner, a person's politics tend to become somewhat more conservative.<sup>271</sup> By 1979, Britain had built enough subsidized rental projects ("council housing") to accommodate one-third of its population. To reverse this long tradition of government-encouraged renting, during the 1980s Margaret Thatcher and the Tories sold over one million of these individual units to their occupants.<sup>272</sup>

## VII. ORDER WITHOUT LAW IN AN ONGOING HOUSEHOLD

Participants in each of the three basic household relationships have an interest in coordinating their efforts to augment the surplus that is available for them to share. Co-occupants, for example, can benefit from improving their system of dividing up household chores; co-owners, their system for keeping the books; and landlords and tenants, their system for dealing with a leaky faucet. Even in the informal setting of the home, participants have rules—commonly unwritten and even unarticulated—that govern the assignment of responsibilities for handling these sorts of tasks. In addition, participants can benefit from rules that restrain affirmative misconduct, such as carving one's initials into the kitchen counter. Together, these rules, which may arise from a wide variety of sources, provide the backbone of everyday domestic life.

As Lisa Bernstein has demonstrated in another context, participants during the midgame of their relationship may look to different rules than they would in endgame.<sup>273</sup> In midgame, all participants in a household relationship by definition are currently satisfied with their shares of the surplus and anticipate that their relationship will continue. During this stage, they are likely to rely mostly on rules of their own making, such as household-specific customs and contracts, rather than on external rules provided by the legal system. Endgame commences when participants first anticipate that some or all of them soon will

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also Maria Concetta Chiuri & Tullio Jappelli, *Financial Market Imperfections and Home Ownership: A Comparative Study*, 47 EUR. ECON. REV. 857 (2003) (stressing the influence of a nation's system of mortgage finance).

271. For instance, homeowners tend to pay closer attention to property tax burdens and are more likely to oppose rent controls. See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 4, 81-82 (2001). But cf. PETER SAUNDERS, *A NATION OF HOME OWNERS* 29-41 (1990) (offering a skeptical assessment of Marxist scholars' assertions that capitalist regimes promote homeownership in order to dampen revolutionary sentiment).

272. See IAN COLE & ROBERT FURBEY, *THE ECLIPSE OF COUNCIL HOUSING* 172, 196-98 (1994).

273. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1796-98 (1996).



terminate the relationship. In endgame, the rules of the legal system are more likely to become influential. This Part analyzes how participants in household relationships create or borrow the rules that govern their midgame affairs. The focus here is on midgame rules because legal scholars have devoted far more attention to endgame rules, and also because domestic life, especially among intimates, is mostly played out in midgame.<sup>274</sup>

*A. The Tendency Toward Welfare-Maximizing Substantive and Procedural Rules*

To enhance their shareable surplus, the participants in a household relationship can be expected to gravitate toward rules that serve to minimize the sum of (1) deadweight losses caused by failures to exploit potential gains from associating with each other, and (2) transaction costs.<sup>275</sup> They are likely to do this even when their adoption of a particular rule would benefit some of them but work to the (lesser) detriment of others. When a household relationship is enduring and multi-stranded, as an intimate relationship typically is, participants often can easily compensate those who lose out in one aspect of the relationship by making offsetting adjustments in other strands. For example, if the duty of vacuuming the Sitcom House's floors is regarded as burdensome, an informal rule that assigned that task to Dad could be counterbalanced by the assignment of other onerous chores to other occupants, such as window washing to Maureen. The power of each individual to exit unilaterally from a household relationship encourages participants to embrace this give-and-take approach. This method of interaction enables them to achieve long-run results that in the aggregate improve the situation of each of them (i.e., are Pareto superior).<sup>276</sup>

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274. Although the legal rules that govern partition, eviction, and other endgame matters plainly are worthy of study, analysts may exaggerate the significance of these laws. Intimates involved in a household relationship are highly unlikely to structure their affairs "in the shadow of" these endgame laws because they anticipate that they will never reach endgame.

275. See *supra* text accompanying notes 209, 234. This prediction is consistent with the hypothesis of welfare-maximizing norms developed in ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 167-83 (1991). To apply a cost-benefit approach of this sort, participants must regard all varieties of costs and benefits to be commensurable and capable of being discounted to present value. Benefits from association, of course, include the pleasures of social interactions as well as receipt of more conventional goods and services. See Ellickson, *supra* note 32, at 1344-62 (discussing social aspects of land institutions). *But cf.* Dagan & Heller, *supra* note 1, at 572-74 (sharply distinguishing between economic and social aspects of domestic life).

276. In the language of economics, the norms of a group of household intimates are likely to require a participant to assent to a low-level rule that is Kaldor-Hicks efficient for the group.

Like legal rules, some household rules are substantive, and others procedural.<sup>277</sup> When choosing among rules of either type, members of a household can be predicted to take into account the same sorts of considerations that scholars address when evaluating the efficiency of a legal rule.

*Substantive rules.* The basic substantive aim of household participants is to internalize externalities arising from behavior within their relationships. This is achieved when a participant's own product from his actions or inactions is made to equal the product for all participants. Thus co-occupants and co-owners should take account of the effects of their actions and inactions on their co-participants, and a tenant should treat the premises as he would treat them if he owned the landlord's interest.<sup>278</sup> Co-occupants' customs, for example, are likely to call for the imposition of negative sanctions on an occupant who tracks dirt into the house or hogs the only television set, and for the conferral of informal rewards on an occupant who prepares an unusually splendid dessert.

The substantive rules applicable to a household relationship also are likely to impose special duties on participants who have private information. Household rules thus generally should allocate losses from household accidents, for example, to the participant who has the best information about potential accident costs and accident prevention costs as well as the best ability to act on that information.<sup>279</sup> When a participant is considering taking a significant action that would alter the status quo, household rules can be expected to require that participant to provide advance notice to the others in the relationship. Co-occupants' norms thus are likely to require an occupant who intends to host a party to clear that idea with the other housemates. Co-owners' norms similarly are likely to require that one of them provide advance

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See Elizabeth Hoffman & Matthew L. Spitzer, *Experimental Law and Economics: An Introduction*, 85 COLUM. L. REV. 991, 1009-12 (1985) (reviewing the authors' experimental findings that interacting parties strongly tend to choose outcomes that maximize their joint profits); A. Mitchell Polinsky, *Probabilistic Compensation Criteria*, 86 Q.J. ECON. 407 (1972) (arguing that individuals focus on the aggregate impact of bundles of decisions, not on the impact of an isolated decision). See generally Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165 (1999).

277. For a richer taxonomy of rules, see ELLICKSON, *supra* note 275, at 132-36. See also ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 52-54 (1990) (categorizing rules used by commoners).

278. Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.11, at 72-73 (6th ed. 2003) (proposing an analogous rule when ownership is divided between holders of present and future interests).

279. See Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972). For example, the risk of a roof leak that arises without any tenant involvement usually is best assigned to a landlord. See ELLICKSON, *supra* note 275, at 278-79.

notice to the others before making a capital improvement to the premises. Likewise, a tenant who plans to paint the interior walls typically must notify the landlord before proceeding.

In addition, household participants often can augment their shareable surplus by obligating those who possess a comparative advantage in performing a task to take on that task.<sup>280</sup> For example, household rules—implicit or explicit—may require the occupant who is the best cook to do most of the cooking and the owner who is most skilled with heating systems to work on maintaining the furnace. Although these sorts of special duties impose special burdens, again, those burdens can be offset by adjustments of rights and duties in other strands of the same relationship.

*Procedural rules: on the advantages of seeking consensus.* Procedural rules govern how participants in a household relationship make collective decisions—for example, how they go about creating new rules, adjudicating the application of a rule to a given situation, or administering internal sanctions. Like substantive rules, procedural rules entail varying combinations of both benefits and transaction costs. It may be worthwhile for household members to go through a thorough but costly procedure, for example, when that approach would cool tempers and thus likely be, to borrow Bernstein's useful phrase, "relationship-preserving."<sup>281</sup> One of the great advantages of a small and intimate relationship is that it enables participants to economize on transaction costs by using informal procedures. Debate around a dinner table need not proceed according to Robert's Rules of Order. Unlike the dozens of owners of a co-housing community, three intimates who co-own residential real estate need not schedule regular weekly meetings, prepare formal agendas, or keep written minutes.<sup>282</sup> Even in an absentee landlord-tenant relationship—typically the most distant of all domestic relationships—investigators have found that the participants are likely to achieve a comfortable mode of interaction.<sup>283</sup>

When a group has three or more members, the decision rule that participants apply to determine when they have resolved a contentious issue is of great importance. Suppose ten graduate students co-occupying a house were considering whether or not to host a party at their abode. Possible decision rules include: (1) majority vote; (2) consensus—that is, debating the issue until no member objects to a particular proposed outcome; and (3) unanimous vote.

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280. Cf. ELLICKSON, *supra* note 275, at 162-64, 210-11, 224-29 (discussing norms when labor is specialized).

281. Bernstein, *supra* note 273, at 1796.

282. Cf. SCOTTHANSON & SCOTTHANSON, *supra* note 87, at 25-29, 172, 269-70 (urging members of co-housing communities to comply with these formalities).

283. RAND CORP., *supra* note 139, at 55.

Superficially, consensus and unanimity appear to be identical decision rules, but they are not. The leader of a consensus-oriented group typically does not call for a formal vote on an issue (or conduct a straw poll), but instead declares, after open debate, that consensus on the issue appears to have been achieved.<sup>284</sup> If one or more members then publicly object, debate continues. In a group governed by consensus, the members of a frustrated majority are free to informally sanction, with negative gossip and the like, dissenters who have refused to go along with the decision for the greater good of the collective. A unanimity rule, by contrast, requires the taking of a formal vote and implies that a stance of uncompromising dissent is within the rules of the game; indeed, balloting may be secret and, when it is, a lone dissenter need not fear the sting of social ostracism.

In their valuable article, Dagan and Heller urge lawmakers to declare that majority rule is the default decision rule for a group of “commoners.”<sup>285</sup> When members number in the hundreds, as they do in most kibbutzim, majority rule indeed is a common practice.<sup>286</sup> But a group of ten graduate students is highly unlikely to proceed in this fashion. When household participants are intimates and number no more than several dozen, a mountain of evidence indicates that they typically favor making decisions by consensus—a procedure, to repeat, that is distinct from seeking unanimity.<sup>287</sup> A sampling of the self-reported procedures of secular intentional communities reveals that 85% of them use consensus as their *only* decision rule.<sup>288</sup> The owner-occupants who govern co-

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284. See JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 32-33 (1980); James H. Davis, *Some Compelling Intuitions About Group Consensus Decisions, Theoretical and Empirical Research, and Interpersonal Aggregation Phenomena: Selected Examples, 1950-1990*, 52 *ORG. BEHAV. & HUM. DECISION PROCESSES* 3, 26-27 (1992).

285. Dagan & Heller, *supra* note 1, at 590-95. Dagan and Heller note the advantages of consensual decision-making, *see id.* at 594, but regard majority rule and unanimity to be the main candidates for a default decision rule. They also recommend that lawmakers require commoners to unanimously approve some measures—for example, a program that would be purely redistributive. *See id.* at 592-93.

286. Many kibbutzim now authorize members to decide selected issues by referendum. *See* ELIEZER BEN-RAFAEL, *CRISIS AND TRANSFORMATION: THE KIBBUTZ AT CENTURY'S END* 58, 89, 181 (1997).

287. Groups as diverse as tribes of foragers and corporate boards of directors similarly prefer to decide by consensus. *See* BOEHM, *supra* note 85, at 113-17; Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 *VAND. L. REV.* 1, 45 (2002).

288. Of the sixty-five secular communities in the IC Sample, *supra* note 121, fifty-five reported making all decisions “by consensus,” and six reported relying exclusively on majority rule. Zablocki’s survey in the 1970s of 120 intentional communities similarly found that occupants, numbering twenty-five on average, tended to be hostile to voting and to favor consensus-seeking. ZABLOCKI, *supra* note 23, at 200-01, 250-56.

housing developments also overwhelmingly prefer to wait until former dissenters have been persuaded to accede to a proposed course of action.<sup>289</sup> And there is some evidence that smaller groups of conventional co-owners also proceed in this fashion.<sup>290</sup>

A quest for consensus can result in long and tedious meetings, the delay of valuable projects, and even stalemate. Nonetheless, the self-interested participants in an intimate household relationship have good reasons for proceeding in this fashion.<sup>291</sup> The process of striving for consensus assures, better than majority rule (especially in its less participatory forms), that debate over a proposal will fully inform proponents about opponents' concerns.<sup>292</sup> To accomplish this end, experts advise the owner-occupants of a co-housing project not only to seek consensus at their meetings but also to make use of cards color-coded to indicate intensity of support or opposition to a measure.<sup>293</sup> When a process of decision-making accounts for intensities of preference, it is more likely to result in outcomes that enhance members' overall welfare.<sup>294</sup> In addition, when participants are intimate, their efforts at consensus-seeking are less likely to result in a costly impasse than if they were to seek unanimity. Those disadvantaged by a proposed measure can be predicted to go along with it, partly on account of social pressure, once they perceive that others strongly

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289. Of the occupied communities on the Cohousing Community List, *supra* note 192, about two-thirds reported that they made decisions solely "[b]y consensus." See also Fenster, *supra* note 187, at 13-14; Tom Moench, *Decision Making*, in THE COHOUSING HANDBOOK, *supra* note 87, at 30, 30-31.

290. See Lewis, *supra* note 127, at 388-89 (describing how three sisters who had inherited properties from their intestate mother made decisions). Dagan & Heller, *supra* note 1, at 615 & nn.254-55, 616, usefully summarize the significant variations among the statutes of several industrialized nations that have attempted (not necessarily with success) to prescribe default decision rules for co-owners.

291. Governance by consensus may be inadvisable when participants are overly numerous or heterogeneous. Some co-housing communities follow a two-stage procedure. In the first stage of decision-making, members seek to reach consensus. Whenever that effort fails, they proceed to a second stage in which they apply a supermajoritarian decision rule. SCOTTHANSON & SCOTTHANSON, *supra* note 87, at 176; Fenster, *supra* note 187, at 29-30, 34-35, 42-43.

292. See the sources on civic republicanism cited in Cheryl D. Block, *Truth and Probability—Ironies in the Evolution of Social Choice Theory*, 76 WASH. U. L.Q. 975, 983 n.29 (1998).

293. SCOTTHANSON & SCOTTHANSON, *supra* note 87, at 266-67; Tom Moench, *Colors of Empowerment*, in THE COHOUSING HANDBOOK, *supra* note 87, at 26, 26-27. In practice, of course, participants may choose to use words, not colored cards, to communicate the depth of their sentiments.

294. On Condorcet's and others' insights into possible shortcomings of majoritarian procedures, see Block, *supra* note 292, at 981-84. See also JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 131-45 (1962) (critically examining the operation of majority voting).

favor it.<sup>295</sup> And, as always when there are multi-stranded social relationships, a participant who relents for the overall good of the group can later be informally compensated when other decisions come before the house. Finally, unlike both unanimity-rule and majority-rule systems, a process of seeking consensus signals that participants are intimate and trustworthy. Those who engage in consensus-seeking thus are likely to derive more pleasure from their decision-making process as such.<sup>296</sup>

### *B. Sources of Household Rules: In General*

Participants in a household relationship can generate their own rules in a variety of ways and also can extract them from a variety of external sources. This Section offers a brief and generally abstract survey of these various sources of social control and sets the foundation for the three flesh-and-blood Sections that follow. Those Sections discuss the social control techniques of the participants in each of the basic household relationships.

#### *1. The Array of Potential Sources of Household Rules*

The overall system of social control is an amalgam of first-, second-, and third-party rules. First-party rules include internalized norms and personal ethics that an individual enforces upon himself.<sup>297</sup> Second-party rules are those that participants in the governed relationship themselves generate. These rules include relationship-specific norms that evolve from participants' practices over time, contracts among participants, and rules promulgated by formal

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295. See Norbert L. Kerr, *Group Decision Making at a Multialternative Task: Extremity, Interaction Distance, Pluralities, and Issue Importance*, 52 *ORG. BEHAV. & HUM. DECISION PROCESSES* 64, 90-92 (1992).

296. For example, a sample document included in SCOTTHANSON & SCOTTHANSON, *supra* note 87, at 176, states: "In order to promote a feeling of community, caring and trust among all members of the group a consensus-seeking process will be used." See also MANSBRIDGE, *supra* note 284, at 8-10, 252-60; cf. Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 *NW. U. L. REV.* 201 (2006) (finding that jurors operating under a unanimity requirement in fact try to achieve consensus and report greater satisfaction with their deliberations than jurors who decide by supermajority).

297. These self-restraints, while crucially important, operate within the household much as they do beyond it. For this reason, the analysis below rarely refers to this form of social control.

organizations that participants may establish.<sup>298</sup> Third-party rules are produced by outsiders; these include ambient social norms generated by diffuse social forces and laws decreed by governments.<sup>299</sup>

Two major themes are developed in the remainder of this Part. The first theme is that, the more intimate the participants in a household relationship are, the more likely they are to make use of second-party as opposed to third-party rules. The second theme is that increasing intimacy among participants brings a particular type of second-party rule to the fore, namely the household-specific norms that arise out of patterns of gift exchange.

## 2. *Internal (Second-Party) Sources of Rules: Of Gift-Exchange*

In a liberal society, participants in any sort of household relationship have substantial freedom to shape their own arrangements. This freedom is likely to incline them to develop their own rules rather than to borrow rules from external sources.<sup>300</sup>

*The relative merits of contracts and relationship-specific norms.* To create their own rules, participants in a household relationship are likely to make some use of both contracts and relationship-specific norms. The latter require a few sentences of introduction. Relationship-specific norms are informal expectations about how each participant *should* behave in the future. They emerge from participants' spontaneous (i.e., unnegotiated) successes at coordinating with one another.<sup>301</sup> The standard label for these sorts of reciprocated acts of cooperation is "gift exchange," a much-studied process of

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298. Cf. Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORG. 5, 11-24 (1985) (reviewing methods that parties may use, in the absence of a state, to make promises credible).

299. Cf. ELLICKSON, *supra* note 275, at 123-36 (presenting a slightly different taxonomy). Commonly, the controller that makes a rule also is the agent that enforces it. For example, state bureaucracies may enforce law and an individual may enforce his own personal ethics on himself. But hybrid systems of social control also are common. Participants in a household relationship, for instance, can use an express contract to create a rule and then rely entirely on external controlling agents—perhaps neighborhood gossips or courts—to enforce that contract. *See id.*

300. *See* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (describing both individuals' desires to customize domestic rules and legal systems' increasing toleration of such efforts); *supra* text accompanying notes 48-52.

301. Cf. Scott & Scott, *supra* note 53, at 1285-88 (discussing the evolution of norms between particular spouses).

low-level coordination.<sup>302</sup> The particularized “customs of the household” that emerge from its history of cooperative practices are somewhat analogous to the varying “customs of the manor” that evolved in medieval English villages.<sup>303</sup>

For a process of gift exchange to be mutually beneficial, each participant must keep a (preferably rough) mental account of who has contributed what and who has received what.<sup>304</sup> Because domestic gift-giving can be fitful, temporary imbalances of trade are likely to arise. A participant who becomes convinced that she will obtain an insufficient flow of net benefits from the process can be expected to respond with escalating self-help measures. As her grievances deepen, her informal remedies might progress from gentle reminders, to more caustic comments, to conspicuous refusals to perform customary duties, to threats of exit, and perhaps even to actual exit from the household relationship.<sup>305</sup>

In selected contexts, contracts between household participants are better than household-specific norms at inducing cooperative behavior. Contracts are particularly useful when participants face a discrete challenge that they haven’t

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302. Gift exchange must be distinguished from purely altruistic gift-giving, which also is commonplace within households. See *supra* note 206. For a concise overview of alternative theories of gift exchange, see Jonathan P. Thomas & Timothy Worrall, *Gift-Giving, Quasi-Credit and Reciprocity*, 14 RATIONALITY & SOC’Y 308, 315-17 (2002). Valuable entryways into the vast literature on the subject include, in anthropology, MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* (W.D. Halls trans., W.W. Norton 1990) (1925); in sociology, BLAU, *supra* note 80, and GEORGE CASPAR HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* (1961); in economics, George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. ECON. 543 (1982), and Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, J. ECON. PERSP., Summer 2000, at 159; and in law, Benkler, *supra* note 65, Leslie, *supra* note 69, and Posner, *supra* note 69.

303. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*74-75. Contrary to Henry Maine’s renowned assertion of a trend from status to contract, see *supra* text accompanying note 35, when household-specific norms are the predominant form of coordination, household relations are determined neither by status nor by contract.

304. Cf. ELLICKSON, *supra* note 275, at 55-56 (discussing the mental accounting of inter-neighbor debts). Excessively close mental accounting of the balance of informal trade, however, manifests distrust and, among married couples, is associated with a greater likelihood of divorce. See Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1981 (2000); see also Bernard I. Murstein et al., *A Theory and Investigation of the Effect of Exchange-Orientation on Marriage and Friendship*, 39 J. MARRIAGE & FAM. 543 (1977) (reporting data consistent with the hypothesis that an exchange-based orientation is generally inimical to the marriage relationship). But cf. Susan Sprecher, *The Effect of Exchange Orientation on Close Relationships*, 61 SOC. PSYCHOL. Q. 220 (1998) (reporting data inconsistent with the thesis that an exchange-orientation impairs a relationship). See generally REGAN, *supra* note 66, at 41-42, 71-73 and sources cited therein.

305. See *supra* text accompanying note 59; cf. ELLICKSON, *supra* note 275, at 56-64 (discussing neighbors’ applications of escalating self-help sanctions to control deviants).



confronted before, when they anticipate that they may disagree on the values of certain outcomes, and when they are untrusting (as, for example, a tenant and absentee landlord may be).<sup>306</sup> When participants in a household relationship do contract with one another, they commonly will regard an oral agreement to be sufficient. Reducing an agreement to writing, however, can help parties prove the substance of their agreement both to one another during midgame, and also to a third party in the event of an endgame dispute.<sup>307</sup>

In many household contexts, however, especially when the participants are intimates, gift exchange is superior to bargained-for exchange. Consider, for example, the choices available to an unmarried but romantically involved young couple who are about to cohabit for the first time. With a view to enhancing the overall quality of their co-occupancy experience, the couple might contemplate, among others, the following four options:

- (1) the negotiation of a complete written contract specifying the two parties' respective rights and duties in every aspect of their forthcoming co-occupancy relationship;
- (2) the negotiation of a bare-bones written agreement requiring one participant to provide "housekeeping services" (or some other vaguely defined bundle of duties), and requiring the other periodically to pay that provider a specified amount of money;
- (3) the negotiation of a bare-bones oral agreement requiring one participant to provide certain categories of services, say, "shopping and cooking," and the second to provide other categories of services, say, "cleaning, laundry, and yard work"; and
- (4) muddling through, that is, relying primarily on gift exchange, whereby each participant would unilaterally perform most tasks without prior negotiation, in the hope of eventually receiving an adequate flow of return gifts.<sup>308</sup>

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306. See CARL E. SCHNEIDER & MARGARET F. BRINIG, *AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES* 427-75 (2d ed. 2000) (insightfully exploring the role of express contracts in family settings); see also ELLICKSON, *supra* note 275, at 246-48, 253, 274.

307. See Jason Scott Johnston, *The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model*, 144 U. PA. L. REV. 1859 (1996) (discussing when merchants choose to put their agreements in writing).

308. As just noted, those who opt to use gift exchange to resolve most issues would not necessarily be averse to using oral contracts to resolve some challenges, such as how to split the work of hosting an unusual event like a large dinner party. See also *infra* text accompanying notes 327-337.

Among trusting intimates, the gift exchange process, the last of these four alternatives, has as many as three potential advantages over the various forms of express contracting. The first advantage of gift exchange is—no surprise here—lower transaction costs.<sup>309</sup> Participants who are confident that their spontaneous reciprocal exchanges will be mutually advantageous can avoid the hassle of negotiating, interpreting, and enforcing explicit terms of trade. The negotiation of a written contract covering all household contingencies would be impossibly expensive to draft. While a bare-bones contract (oral or written) could be negotiated in minutes, it is likely to be rife with ambiguity and to invite haggling over interpretation.<sup>310</sup> Do “housekeeping services” include paying the bills? Are “cooking” obligations to be relaxed when the designated cook falls sick? How often should the person with “cleaning” responsibilities sweep out the garage? And so on. For the relationship to prosper, the two parties would have to be able to engage in an informal give-and-take to resolve these sorts of ambiguities. But if they could succeed at such a give-and-take, they likely also could succeed by muddling through without an overarching contract. Informal gift exchange of course entails transaction costs of its own, in part because co-occupants must keep rough mental accounts of how they stand with one another. But, among trusting intimates, these costs tend to be lower than the transaction costs of negotiating and enforcing an express contract, whatever its degree of complexity.

A second advantage of gift exchange is that it can be kept money-free (in contrast to the hypothetical couple’s second option, the exchange of housekeeping services for a monthly wage). Because money is fungible, most outsiders that provide household services, such as commercial housecleaning firms, prefer cash transactions to barter transactions. Intimates, by contrast, typically have a strong aversion to engaging in monetized transactions with one another.<sup>311</sup> Just as a well-socialized dinner guest arrives bearing as a gift a bottle

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309. See Ben-Porath, *supra* note 1, at 5-8, 18 (implying that gift exchange among intimates is a relatively cheap mechanism).

310. When parties who are somewhat trusting negotiate a written contract, they commonly choose to keep many of its terms indefinite. See Scott, *supra* note 65. Labor contracts, for example, tend to be quite incomplete and, as a result, an employment relationship typically involves significant elements of gift exchange. See Akerlof, *supra* note 302. This occurs in part because a worker’s exact contributions may be too subtle to be objectively measured. See George Baker et al., *Subjective Performance Measures in Optimal Incentive Contracts*, 109 Q.J. ECON. 1125 (1994).

311. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); *infra* note 327 and accompanying text; see also VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* (2005) (discussing the use of money in intimate relationships of all sorts); cf. ELLICKSON, *supra* note 275, at 61-62, 78, 234-36 (1991) (describing the preference of neighbors in rural Shasta County, California, to use in-kind gifts, not money, to compensate one another). *But cf.*

of wine and not a twenty-dollar bill, intimate housemates don't pay wages to one another. Instead, by serially exchanging in-kind gifts, participants in a household relationship signal their mutual feelings of intimacy and trust.<sup>312</sup> This mode of exchange thus enhances prospects for cooperative interactions in the future.

Third, recent research indicates that a process of reciprocal gift-giving, apart from other instrumental advantages, may intrinsically generate utility for its participants.<sup>313</sup> There is neurological evidence, for example, that reciprocated acts of cooperation generate pleasure.<sup>314</sup> And one team of experimenters found that individuals regarded the outcomes of informally reciprocated exchanges as fairer than the outcomes of negotiated exchanges, even when the material results were identical.<sup>315</sup> In sum, intimates have many reasons to favor spontaneous gift exchange over express contracting.<sup>316</sup>

*Hierarchically organized household relationships.* As participants become more numerous, the administrative costs of both contracting and gift exchange rise precipitously. Members of a twosome have a single one-on-one relationship to

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Schultz, *supra* note 196, at 1901-06 (contending that workers especially value paid work). See generally RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005). In addition to the reasons provided in the text, participants in a household relationship in some nations conceivably might refrain from transferring cash in order to reduce the recipient's income tax liabilities or to enhance the recipient's eligibility for welfare benefits.

312. See ELLICKSON, *supra* note 275, at 234-35; *supra* note 69 and accompanying text.

313. See Joel Sobel, *Interdependent Preferences and Reciprocity*, 43 J. ECON. LITERATURE 392 (2005) (reviewing the literature). A kindred proposition holds that an actor who receives extrinsic rewards for an action derives less intrinsic satisfaction from performing that action. See, e.g., RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971) (analyzing the motivations of blood donors); Sobel, *supra*, at 416-17.

314. Ernst Fehr et al., *Neuroeconomic Foundations of Trust and Social Preferences: Initial Evidence*, 95 AM. ECON. REV. 346 (2005); see also Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281 (1993) (arguing that individuals enjoy being nice to those who have been nice to them).

315. Linda D. Molm et al., *In the Eye of the Beholder: Procedural Justice in Social Exchange*, 68 AM. SOC. REV. 128 (2003); cf. Heather Mahar, *Why Are There So Few Prenuptial Agreements?* 16 (John M. Olin Ctr. for Law, Econ., & Bus., Harvard Law Sch., Discussion Paper No. 436, 2003), available at [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/436.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf) (reporting that about 60% of survey respondents regarded a request for a prenuptial agreement as a reason for raising their estimates of the probability of divorce).

316. But cf. Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 55-59 (1998) (urging a marrying couple to execute a written agreement); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 328-34 (1982) (urging married couples to make greater use of written contracts and also urging courts to enforce such contracts even when the marriage is ongoing).

keep in healthy balance. In a threesome, there are 3 of these one-on-one relationships. In an eightsome, there are 28. In a group of 50, there are 1225.<sup>317</sup> The relative efficiency of establishing a centralized hierarchy to coordinate actions thus grows markedly with group size. In addition, increased size tends to erode intimacy and trust, and with them the attractiveness of more decentralized systems of coordination.

A co-occupant or co-owner group that includes dozens of participants therefore commonly creates a formal organization responsible for handling many of its coordination issues.<sup>318</sup> A hierarchy, of course, is a mixed blessing. The formalization of governance gives rise to administrative costs and rigidities and opens up the possibility that unfaithful agents will seize the reins. For members of a small group, the creation of a governing body is, on balance, highly unlikely to be worth the bother. But for a large group, the existence of a permanent administrative structure supervised by specialized managers can give rise to significant efficiencies. A hierarchical solution is essential in, for example, a timeshare development, where owner-occupants rotate in possession as often as weekly and have virtually no face-to-face contact.<sup>319</sup>

### 3. *External (Third-Party) Sources of Rules*

*Ambient social norms.* Instead of developing their own rules, participants in a household relationship can adhere to the informal rules of appropriate behavior that are diffusely enforced by neighbors and members of other external social networks. A culture's ambient norms can greatly influence domestic arrangements, particularly when participants in a household relationship have internalized these norms.

In a liberal society devoted to freedom of contract, neighbors and other potential informal enforcers are likely to grant participants in a household relationship broad leeway to tailor internal rules.<sup>320</sup> Like liberal lawmakers,

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317. The formula is  $n(n-1)/2$ , where  $n$  is the number in the group.

318. A foundational theoretical work on the role of hierarchies is OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975). See also Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1182-85 (2006) (offering diagrams that portray alternative forms of hierarchy).

319. A statute indeed may require the developer of a timeshare project to designate a management entity prior to marketing shares in the project. See, e.g., FLA. STAT. ANN. § 721.13(1)(a) (West 2000). On timeshare entities, see generally *supra* note 252.

320. See ALAN WOLFE, *ONE NATION, AFTER ALL* 108-11, 129-31 (1998) (reporting the results of interviews in which most Americans expressed broad tolerance toward others' modes of living).

liberal neighbors are most likely to enforce ambient norms applicable to the internal practices of a household when violation of those norms would harm either outsiders like themselves or helpless insiders.<sup>321</sup> For example, if a group of co-occupants were to neglect maintenance of a house's front-yard landscaping or were to abuse children inside the house, neighbors might respond with negative gossip or more severe sanctions.

*Legal rules.* In a liberal society, the legal system performs a crucial role in helping to ensure basic individual entitlements such as private property, protection from interpersonal violence, and the right of unilateral exit from a household. These backdrop entitlements underpin all interactions among household members.<sup>322</sup> Public law rules that govern relations between citizen and state, such as tax and welfare policies, also may significantly influence the housing stock, co-occupants' rent-or-buy decisions, and perhaps the composition of co-occupant and co-owner groups.<sup>323</sup> By contrast, the small-bore private law rules that either legislatures or courts promulgate are not likely to have much influence on midgame household relations among intimates. A central finding of empirical legal scholars is that low-stakes disputes among individuals in a continuing relationship tend to be resolved beyond the shadow of the law, that is, without regard to nominally applicable legal rules.<sup>324</sup> Although in some contexts this peripheral role of private law rules may be partly attributable to the participants' lack of confidence in the legal system, in all situations a major factor is the participants' desire to avoid the transaction costs involved in learning applicable law and pursuing legal remedies. Indeed, if an intimate were to seek to resolve a midgame domestic dispute by filing a lawsuit, the other participants typically would deem that legalizing step a grievous violation of the customs of the household.<sup>325</sup>

### C. Rules for Co-Occupants

Drawing on the various sources just surveyed, co-occupants develop rules to resolve mundane issues such as how to assign the duty of vacuuming the floor and the power to control the television remote. As noted, intimate housemates are likely to rely mainly on an ongoing process of gift exchange to

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321. See *supra* text accompanying notes 154-158. But cf. McAdams, *supra* note 76, at 412-19 (discussing the possibility of "nosy norms").

322. See *supra* Section I.B.

323. See *supra* text accompanying notes 161-165, 268-272.

324. See sources cited in ELLICKSON, *supra* note 275, at 141-47, 256-57.

325. See *id.* at 250-52.

generate “customs of the household” that implicitly resolve many of their coordination issues.<sup>326</sup> An intriguing empirical question is to what extent co-occupants supplement these household-specific norms with other rules that they themselves more formally devise or that they import from lawmakers or other outsiders.

### 1. Co-Occupant-Created Contracts and Hierarchies

*Oral contracts.* New housemates commonly converse about how rooms are to be allocated, chores performed, and bills paid. Intimates are apt to structure these agreements, however, in a fashion that signals that they indeed are intimates. For example, a domestic oral contract is far more likely to call for, or presume, in-kind compensation as opposed to monetary compensation, such as the payment of wages.<sup>327</sup> Moreover, because insistence on a written document

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326. On the advantages that spouses may obtain by coordinating via gift exchange as opposed to express contract, see Ira Mark Ellman, “Contract Thinking” Was Marvin’s Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1373-79 (2001); and Pollak, *supra* note 1, at 595-97.

Critics of the gift exchange process among housemates assert that it systematically advantages the powerful, in particular men over women. See, e.g., Schultz, *supra* note 196, at 1899-1902 (applauding the trend of contracting out household work on the ground that outside workers are less likely than occupants to be exploited); see also Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21 (characterizing our social structure as overly patriarchal and critiquing liberal models of social interactions). These critics do not accept, at least in the context of inter-gender relations, the premise that background legal and social conditions in the United States are liberal—that is, that occupants can use either voice or exit to avoid exploitation within the home.

The results of empirical studies of interspousal relations are mixed. Wives in good marriages tend to be happier, and wives in bad marriages tend to be unhappier, than unmarried women. See sources cited in Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 432-33 (2004); see also Gary R. Lee et al., *Marital Status and Personal Happiness: An Analysis of Trend Data*, 53 J. MARRIAGE & FAM. 839 (1991). A large majority of wives report that they regard the division of labor within their homes to be fair. See Mary Clare Lennon & Sarah Rosenfield, *Relative Fairness and the Division of Housework: The Importance of Options*, 100 AM. J. SOC. 506, 507 (1994); sources cited in Nock, *supra* note 304, at 1977. But cf. JESSIE BERNARD, *THE FUTURE OF MARRIAGE* 27-28, tbls.10 & 14-16 (2d ed. 1982) (asserting that marriage tends to be detrimental to a woman’s health).

327. See *supra* text accompanying note 311. On the role of money within the marriage relationship specifically, see generally BLUMSTEIN & SCHWARTZ, *supra* note 61, at 51-111; and JAN PAHL, *MONEY AND MARRIAGE* (1989), which analyzes spousal practices in the United Kingdom. Feminist scholars who urge monetary compensation for household work implicitly recognize the symbolic disadvantages of spouse-to-spouse payments for the performance of discrete domestic tasks. See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A*

signals distrust, intimates are likely to prefer an oral deal to a written one.<sup>328</sup> Even when participants regard their oral promises to be informally binding, they are likely to avoid saying anything to imply that these obligations would be legally enforceable; in an intimate relationship, the keeping of a promise is likely to do more to enhance the relationship when participants perceive that performance was in no way legally coerced.<sup>329</sup>

*Written contracts.* A number of commercial firms sell sample contractual forms designed to help housemates structure their relationships. These forms tend to be aimed at helping an unmarried couple resolve, in midgame, the sharing of operating expenses owed to outsiders and, in endgame, the disentangling of personal property and financial accounts (and, if relevant, post-separation obligations of partner and child support).<sup>330</sup> The forms in Nolo's *Living Together: A Legal Guide for Unmarried Couples*, now in its twelfth edition, focus almost entirely on these issues, as opposed to the allocation of

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THEORY OF DEPENDENCY 31-54, 284-91 (2004) (urging governments to compensate caregivers within households); accord NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* 49-51, 109-13 (2001); SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 180-81 (1989) (opposing cash compensation for particular household tasks, but advocating that each spouse receive half of any paycheck earned for work performed outside the household); see also CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 63-80 (1989) (reviewing, mostly from a Marxian perspective, arguments for and against the payment of wages for housework); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 129-31 (2000) (urging legal rules that would divide equally, after divorce, former spouses' assets and future incomes). Many parents pay children for performing extra chores, in part to prepare them for employment relations outside the household. See Pamela M. Warton & Jacqueline J. Goodnow, *Money and Children's Household Jobs: Parents' Views of Their Interconnections*, 18 INT'L J. BEHAV. DEV. 335, 343 (1995) (also reporting that parents tend to feel ambivalent about making these payments).

328. See *infra* notes 330-337 and accompanying text.

329. See Dori Kimel, *Neutrality, Autonomy, and Freedom of Contract*, 21 OXFORD J. LEGAL STUD. 473, 490-93 (2001); see also *supra* text accompanying notes 313-314. But cf. Anthony J. Bellia Jr., *Promises, Trust, and Contract Law*, 47 AM. J. JURIS. 25 (2002) (critiquing Kimel's behavioral assumptions).

330. See, e.g., 9B AM. JUR. LEGAL FORMS 2D *Husband & Wife* §§ 139:135-:159 (2002 rev.); IHARA ET AL., *supra* note 88; DORIAN SOLOT & MARSHALL MILLER, *UNMARRIED TO EACH OTHER* 137-41 (2002). In endgame, courts are more likely to enforce an obligation that has been reduced to writing. See, e.g., MINN. STAT. ANN. § 513.075 (West 2002) (stating that a court is to enforce a cohabitation agreement between an unmarried man and woman only if it is in writing and only after termination of their relationship); cf. *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980) (allowing an ex-cohabitant to pursue recovery based on an oral contract, but not on an implied contract theory). But see *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (permitting an ex-cohabitant to proceed on both oral-contract and implied-contract theories). See generally *infra* text accompanying notes 368-370.

physical spaces, the assignment of household chores, and the articulation of rules of deportment. As the authors put it:

The contracts included in this chapter [on “living together agreements”] pertain only to property and finances. They do not cover the day-to-day details of your relationship, such as who will do the dishes, who will walk the dog, how many overnight guests you’ll allow, and whose art goes in the living room. A court won’t—and shouldn’t be asked to—enforce these kinds of personal agreements. If your agreement includes personal as well as financial clauses, a court might declare the entire contract illegal or frivolous and refuse to enforce any of it—including the more important financial clauses. Obviously, you need to be clear with your partner on things such as house-cleaning and cooking. Just don’t mix up these day-to-day issues with the bigger legal issues of living together.<sup>331</sup>

One of *Living Together’s* co-authors, Frederick Hertz, an Oakland attorney who has long urged unmarried cohabiting couples, both straight and gay, to negotiate written agreements, has admitted that only a “miniscule fraction” of them in fact choose to do so.<sup>332</sup>

A few commentators even advise co-occupants who are not romantically involved, and whose prospective relationships thus are far simpler, to negotiate written contracts.<sup>333</sup> These “roommate agreements” may be sensible when housemates are particularly untrusting, for example, after a Manhattan real estate agency has brought together utter strangers who share only an interest in splitting rental costs.<sup>334</sup> Co-occupants also conceivably might benefit from a

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331. IHARA ET AL., *supra* note 88, at 3/3; see also KATHERINE E. STONER & SHAE IRVING, PRENUPTIAL AGREEMENTS 2/7 (2004) (“[A] prenup isn’t the best place to address lifestyle agreements—that is, matters such as who’s responsible for taking out the garbage and what kind of schedule you will keep . . .”). But cf. IHARA ET AL., *supra* note 88, at 3/20 (providing a sample agreement that requires the breadwinner to pay a weekly salary to the homemaker).

332. Ellman, *supra* note 326, at 1367 n.17 (reporting Hertz’s admission that co-occupants who request that documents be drafted typically end up not signing them). But see Posik v. Layton, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997) (enforcing, after a breakup, the terms of a lesbian couple’s written cohabitation agreement that had required one partner to do the cooking, housework, and yard work).

333. Sources advocating, and offering examples of, written roommate agreements include JANET PORTMAN & MARCIA STEWART, RENTERS’ RIGHTS: THE BASICS 6/6–9 (4th ed. 2005), and Abby Ellin, *Taming Roommate Chaos*, N.Y. TIMES, Mar. 16, 2003, § 3 (Business), at 9.

334. In neighborhoods of New York City where apartments are unusually expensive, about two dozen companies, some of them less than reputable, advertise that they specialize in helping



written agreement when their stakes are unusually high, perhaps because their lease has a term of several years or because they live in a rent control jurisdiction.<sup>335</sup>

Some colleges and universities encourage students who are roommates to negotiate detailed written contracts to govern behavior within their shared space.<sup>336</sup> These contracts make the most sense, if they ever do, when roommates are total strangers, such as entering freshmen.<sup>337</sup> Many students, who likely have a better sense than university administrators of the optimal amount of formalization of living arrangements, resist drafting roommate agreements and instead prefer to talk a few things through and otherwise rely on unstructured give-and-take.

*Formal organizations of co-occupants.* An intentional community that includes at least several dozen residents usually has some sort of formal central authority, both to handle internal matters and also to enter into contracts with outsiders. These institutions vary widely in form. When the owners of an intentional community also all reside there, the governance of both co-owner and co-occupant affairs may be consolidated in a single central authority. As a matter of ideology, members of most secular communes are likely to prefer a highly participatory form of governance involving frequent group-wide meetings.<sup>338</sup> As the number of residents grows, however, this arrangement becomes less practicable. Thus, while a small co-housing community may make its decisions in group-wide sessions, a larger one is likely to rely significantly on representative democracy, such as governance by an elected

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total strangers arrange for co-rentals. See Dennis Hevesi, *Making Roommates of Perfect Strangers*, N.Y. TIMES, Aug. 20, 2000, § 11 (Real Estate), at 1.

335. An example of how rent control raises stakes is *Ganson v. Goldfader*, 561 N.Y.S.2d 366 (Sup. Ct. 1990), a battle among a series of contract-writing occupants of a rent-stabilized Manhattan apartment over which of them was entitled to buy the unit at the insider price when the building was converted to a cooperative.

336. See, e.g., Swarthmore Coll. Hous., RA Resources, <http://www.swarthmore.edu/Admin/housing/raresource/roommate.htm> (last visited Sept. 25, 2006); Univ. of Iowa Tenant Landlord Ass'n, Roommate Issues, <http://www.uiowa.edu/~tla/tenant/roommate.shtml> (last visited Oct. 9, 2006).

337. See, e.g., UMass Amherst, Housing and Residence Life, [http://www.housing.umass.edu/announce/state\\_of\\_housing.html](http://www.housing.umass.edu/announce/state_of_housing.html) (last visited Sept. 1, 2006) (encouraging freshmen at UMass Amherst to sign roommate agreements). But cf. Tamar Lewin, *First Test for Freshmen: Picking Roommates*, N.Y. TIMES, Aug. 7, 2003, at A1 (reporting that some universities encourage entering students to use an online matchmaking service to find roommates).

338. See ZABLOCKI, *supra* note 23, at 250-55; *supra* note 288.

board of directors.<sup>339</sup> Large intentional communities typically become more hierarchical as time passes.<sup>340</sup> For example, kibbutzim, which have about 400 residents on average,<sup>341</sup> have been shifting governance responsibilities away from their general assemblies and toward boards of directors, elected councils, and designated officers.<sup>342</sup> Perhaps to avoid this level of bureaucratization, the residents of newly founded intentional communities now tend to keep the number of adult occupants down to two dozen or so.<sup>343</sup>

Some intentional communities opt for a more autocratic form of governance that places authority over co-occupant affairs in the hands of a leader or small leadership group that the occupants cannot unseat. In these instances, the implicit or explicit leases between the household's owner and the occupants require occupants to obey this designated executive (who usually is either the owner or the owner's agent). Many religion-based intentional communities, such as those of the Hutterites, are organized in this fashion.<sup>344</sup>

Historically, many large family-based households have been headed by hierarchs, who typically obtained sole ownership through inheritance, usually according to rules that favored senior males.<sup>345</sup> Surveying practices in the Classical period in ancient Greece, Aristotle asserted in *The Politics* that "every household is monarchically governed by the eldest of the kin."<sup>346</sup> In a

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339. See SCOTTHANSON & SCOTTHANSON, *supra* note 87, at 267-69; Fenster, *supra* note 187, at 13-14. The occupants of a voluntary group quarters, such as a retirement home or college dormitory, similarly may elect an advisory governing board.

340. See ZABLOCKI, *supra* note 23, at 46-47 (discussing the tendency of communes to drift toward charismatic authoritarian leadership).

341. This average is derived from figures provided in Avraham Pavin, *The Kibbutz Movement: Facts & Figures 2003*, 48 KIBBUTZ TRENDS 57, 57 (2003).

342. See BEN-RAFAEL, *supra* note 286, at 107-11, 181, 184. *But cf.* *supra* note 286 (noting that some kibbutzim make use of referenda).

343. See SCOTTHANSON & SCOTTHANSON, *supra* note 87, at 128 (advocating communities of between twelve and thirty-six dwelling units); ZABLOCKI, *supra* note 23, at 43, 83 (asserting that the average number of residents of a U.S. commune fell from over 100 before 1820 to about twenty-five in 1965-1975); *supra* note 121. Because privacy and autonomy are superior goods, see *supra* text accompanying note 239, a society's intentional communities are likely to become smaller as its wealth increases.

344. Hutterite communities historically have been governed by six designated male elders. PETER, *supra* note 222, at 61, 81. Members of the Oneida community conferred absolute power on their theocratic leader, John Noyes. See CARDEN, *supra* note 175, at 85-88. A majority of the religious communities in the IC Sample, *supra* note 121, reported that a leader or leadership core group had special decision-making power.

345. See Ellickson & Thorland, *supra* note 99, at 355-57 (discussing hierarchically organized households in the earliest historical periods).

346. ARISTOTLE, *supra* note 14, at 9.

gargantuan medieval English noble household, the earl or other owner issued “ordinances” to govern the conduct of the co-occupants and hired stewards to supervise internal affairs.<sup>347</sup>

These hierarchically organized households were descendants of the ancient *paterfamilias* form, exemplified by the Homeric extended family household.<sup>348</sup> The *paterfamilias* model has been particularly prominent in societies that deny the basic liberal rights of self-ownership and free exit to slaves—and often to wives and some adult children as well. Despite these unsavory aspects, the *paterfamilias* form enabled significant reductions in the transaction costs of organizing family and household affairs, an advantage that has undoubtedly contributed to its prevalence in nonliberal societies. Although the selection of a single household owner according to mechanical inheritance rules may devolve leadership into the hands of an incompetent, this system at least reduces the amount of energy younger family members waste in currying favor with their elders.<sup>349</sup> More important, by vesting controlling powers in a single person, the *paterfamilias* form enables some centralized structuring of the affairs of dozens or even hundreds of co-occupants. By identifying a single authoritative household leader, it also expedites dealings with outsiders such as neighboring households. Even in the nonliberal settings where the *paterfamilias* form flowered, ambient norms commonly evolved to temper abuses by the household head. Social norms, for example, directed the law-giver (*kurios*) in a Homeric household to promote a shared sense of affectionate belonging (*philia*).<sup>350</sup> In addition, a *paterfamilias* or feudal lord commonly was unable to sell the household premises and pocket the proceeds. Instead, he was under some obligation to give other family members access to it and, upon his death, to pass it on according to the same mechanical rules of succession by which he had obtained it.

Although the *paterfamilias* form can enable transaction cost savings, the form conflicts with central liberal values. It is no surprise then that with the spread of liberalism and the rise in wealth in recent centuries, the *paterfamilias*

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347. See MERTES, *supra* note 244, at 6-7, 17-18, 22, 25, 177-80.

348. See *supra* text accompanying notes 102-106.

349. See generally James M. Buchanan, *Rent Seeking, Noncompensated Transfers, and Laws of Succession*, 26 J.L. & ECON. 71, 78-79 (1983) (identifying some advantages of mechanical rules of inheritance).

350. See BOOTH, *supra* note 27, at 17-21, 38-39. A Roman *paterfamilias* was similarly constrained by a duty of *pietas*. See RICHARD P. SALLER, *PATRIARCHY, PROPERTY AND DEATH IN THE ROMAN FAMILY* 105-14 (1994).

form of governing co-occupant affairs—while showing some staying power in China, India, the Arab world, and elsewhere—generally has been in decline.<sup>351</sup>

## 2. Co-Occupant Adherence to Ambient Norms and Laws

*Ambient social norms.* Widely honored customs can greatly influence the composition of co-occupant groups and also the practices within households. In many societies, adult children have been expected to live with or near their aging parents. Ambient norms concerning gender roles, particularly if they have been internalized, are likely to strongly influence the allocation of co-occupants' tasks.<sup>352</sup> By looking to customary gender roles for guidance about what gifts of labor to make, co-occupants can reduce their transaction costs of coordination.<sup>353</sup> If widely embraced, however, ambient norms that pressure women into disproportionately performing certain domestic tasks may impair women's shares of household surplus.<sup>354</sup>

*Legal rules.* Except when the welfare of outsiders or helpless insiders is at stake, liberal lawmakers usually are reluctant to intervene in housemates' internal affairs.<sup>355</sup> Indeed, the Supreme Court has struck down, on constitutional grounds, a number of state attempts to regulate home behavior and the composition of co-occupant groups.<sup>356</sup>

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351. See *supra* notes 112–114.

352. See Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1914–16 (2000). On the inclinations of most men and women to adhere to traditional gender roles within a household setting, see SARAH FENSTERMAKER BERK, *THE GENDER FACTORY: THE APPORTIONMENT OF WORK IN AMERICAN HOUSEHOLDS* 164–65, 201–11 (1985); and STEVEN L. NOCK, *MARRIAGE IN MEN'S LIVES* 37–62 (1998).

353. See Lundberg & Pollak, *supra* note 59, at 993–94. Adherence to traditional gender roles was customary at Woodstock-era communes nominally committed to gender equality. ZABLOCKI, *supra* note 23, at 318–20.

354. See Gillian K. Hadfield, *A Coordination Model of the Sexual Division of Labor*, 40 J. ECON. BEHAV. & ORG. 125 (1999).

355. See *supra* text accompanying notes 154–160. But cf. Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 FORDHAM L. REV. 1617, 1646 (2001) (“Government does have an interest in who does the dishes . . .”). See generally D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006) (reviewing ways in which the law is more protective of the home than of other types of property); Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135 (reviewing the history of government involvement in family arrangements).

356. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a statute criminalizing the consensual act of sodomy within the privacy of the home violated substantive due process); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (holding that an ordinance prohibiting a grandmother from living with two grandsons who were not brothers violated substantive

Judges similarly are unlikely to be willing to hear a common law claim between current housemates. Suppose a graduate student filed in small claims court an action for damages against a *current* housemate whom she accuses of having failed to carry out agreed-to household chores. A judge almost certainly would dismiss the complaint, and for good reason.<sup>357</sup> If a party enmeshed in a multi-stranded relationship were ordered by a court to render compensation for inappropriate behavior in a single strand, he might respond by making offsetting countermoves in other strands—for example, by being surlier at the dinner table. A court that recognized the likely necessity of continuing judicial oversight of a complex web of intimate relations understandably would refuse to get involved in midgame affairs in the first place.<sup>358</sup> This would not, however, leave the victim without recourse. The cohabitation relationship would likely provide her with numerous opportunities to employ self-help to discipline the offender, and she also could exit from the relationship (and, after exit, conceivably initiate an endgame legal action).

Even if judges were willing to apply small-bore private law rules to resolve midgame disputes between housemates, most competent adults would ignore those rules and legal opportunities and instead rely on cheaper nonlegal means of controlling one another. In a well-known study, Vilhelm Aubert found that no lawsuits had been brought under the Norwegian Housemaid Law of 1948 during its first two years because, to curb employer abuse, housemaids

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due process). *But cf.* *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding, against wide-ranging constitutional attack, an ordinance that limited the composition of non-family households to a maximum of two adults). For criticism of *Belle Terre*, see Karst, *supra* note 50, at 686-89. Some states, however, have been more protective of domestic freedom. *See, e.g., City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980) (striking down, as a violation of a state constitutional provision, an ordinance that restricted the creation of households of more than five unrelated persons). Arguments for favoring family households over non-family households are arrayed in Haddock & Polsby, *supra* note 1.

357. *See supra* text accompanying note 331 (identifying the risk that a court would deem such a complaint legally frivolous).

358. Most courts decline to reach the merits of a civil complaint filed by one spouse against the other prior to endgame, that is, before the two have either initiated a divorce proceeding or begun to live apart. *See, e.g., Hasday, supra* note 66, at 499-507; Shultz, *supra* note 316, at 232-37. Defenders of this tradition of judicial noninvolvement in ongoing marriages include Levmore, *supra* note 41, at 244-48, and Scott & Scott, *supra* note 53, at 1294-95. *See also* Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; Or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 300-02 (1987) (discussing the futility of specifically enforcing intimate obligations). Among those urging greater judicial oversight are Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985), and Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 481-89 (1998).

continued to rely entirely on their ability to exit from the household.<sup>359</sup> Partly because resort to law is so expensive and partly because judges resist getting involved, any sort of midgame lawsuit between the co-occupants of a household is highly exceptional, absent the prospect of collecting from a liability insurance company or other third party.<sup>360</sup>

### 3. *Two Specific Substantive Challenges for Co-Occupants*

*The extent of privatization of household spaces.* Besides developing rules to govern behavior in their common spaces, co-occupants have another major option: the privatization of selected parts of their joint domain.<sup>361</sup> The public spaces of a household are a form of commons, vulnerable to classic abuses such as overuse and inadequate maintenance.<sup>362</sup> One of the standard antidotes to a potentially tragic commons is the transfer of particular spaces and objects from common to individual ownership. By awarding a particular housemate virtually complete control over a particular bedroom, for example, a group of co-occupants can internalize to that person most of the costs and benefits of the maintenance decisions involving that room.<sup>363</sup> The fine-grained rules of a household similarly may grant a particular occupant special rights to use a certain chair, television set, or parking space (although perhaps only at special times).<sup>364</sup> Privatization measures of this sort can not only reduce the transaction costs of coordination, but can also create individual zones of

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359. Vilhelm Aubert, *Some Social Functions of Legislation*, 10 ACTA SOCIOLOGICA 98 (1967).

360. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* §§ 10.1-10.2 (2d ed. 1988) (discussing possibilities of tort litigation between family members).

361. See Lauren Lipton, *The His-and-Hers House: With More Space, Couples Build in Separate Lairs*; A 'Gentlemen's Room,' WALL ST. J., Aug. 15, 2003, at W1.

362. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968); Paul Seabright, *Managing Local Commons: Theoretical Issues in Incentive Design*, J. ECON. PERSP., Fall 1993, at 113.

363. See Seabright, *supra* note 362, at 124-29. Virginia Woolf contended that "a woman must have money and a room of her own if she is to write fiction." VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 4 (Harcourt, Brace & World, Inc. 1957) (1929). She also observed, however, that Jane Austen wrote her novels in her house's common sitting room. *Id.* at 70. But cf. DAPHNE SPAIN, *GENDERED SPACES* (1992) (asserting that the specialization of household spaces tends to disadvantage women).

364. Cf. ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 243-49 (1961) (discussing the informal privatization of common spaces within asylums). A space that is privatized only during limited time periods is a "semicommons," a particularly complex ownership regime. See Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131 (2000).

autonomy and privacy within the larger domain. Privatization also has disadvantages, of course, chief among them the elimination of the other housemates' privileges to use the privatized space.<sup>365</sup>

Co-occupant decisions to privatize need not be explicit. A particular housemate's repeated and exclusive use of a space may give rise to an informal entitlement. However, privatizations of larger spaces, such as entire bedrooms, have major domestic repercussions; even intimate co-occupants thus may resort to oral contracts, perhaps prior to moving in, to achieve these outcomes. In less intimate environments such as co-housing communities, owner-occupants routinely enter into written contracts that precisely identify their shared and unshared spaces.

Privatization practices vary widely in intentional communities. Leaders of many religion-based settlements such as those of the Benedictines and the Hutterites are ideologically committed to sharing and thus resistant to the inevitable pressures toward greater privatization of space.<sup>366</sup> Secular communities, by contrast, commonly are significantly privatized; as noted, in kibbutzim and co-housing developments, private dwelling units with full kitchens have become virtually universal.<sup>367</sup>

*When co-occupants anticipate periods of grossly unbalanced labor contributions.* Co-occupants contribute labor—an input typically more fine-grained than capital—to their household's economy. In many households, the fine granularity of labor readily enables housemates to keep their rough interpersonal accounts in balance. In some situations, however, one housemate may ask another to render for many years, without prompt recompense, a valuable flow of domestic services and speak of eventually correcting the imbalance by bestowing major rewards in the distant future. Two classic scenarios are these: A co-occupying adult cares for an aging relative, expects to be appropriately awarded in the relative's will, but is not.<sup>368</sup> An unmarried homemaker provides a valuable flow of domestic services to a cohabiting

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365. Privatization also may entail the sacrifice of other benefits of sharing, such as risk-spreading, exploitation of scale economies in production and consumption, and the social pleasures of communal interactions. Ellickson, *supra* note 32, at 1332-62.

366. Even in Hutterite settlements, however, families have separate bedrooms and at least semi-private sitting rooms. See PETER, *supra* note 222, at 178, 202-03.

367. See *supra* text accompanying notes 185-186, 189-191.

368. Compare *Tuckwiller v. Tuckwiller*, 413 S.W.2d 274 (Mo. 1967) (ordering an executor to honor a written contract between the decedent and a caregiver that called for the devise of the decedent's farm to the caregiver), with *Feigenspan v. Pence*, 168 S.W.2d 1074 (Mo. 1943) (declining to order specific performance of an oral contract with allegedly similar terms).

breadwinner who does little in return except to vaguely promise major future rewards; after the couple separates, the breadwinner fails to deliver.<sup>369</sup>

How might vulnerable gift-givers protect themselves in such situations? One option is to insist, early in the housemate relationship, on a written contract that specifically spells out the gift-giver's entitlements to future compensation. If the co-occupants were intimates at the time, however, insistence on a written contract would send a strong and potentially damaging signal of distrust.<sup>370</sup> The vulnerable party's better option therefore may be to make clear that she will reduce her levels of gifts and perhaps even consider exiting from the household unless the recipient starts providing, now rather than later, a more adequate flow of return gifts.

These gripping scenarios frequently give rise to litigation in endgame. Lawmakers in most states have not been sympathetic to a plaintiff who is unable to ground her claim for compensation on a written contract. This stance may be attributable to the difficulties a court typically has in determining both the oral promises that were made and also the gifts that actually were exchanged while the relationship was ongoing. More fundamentally, a judge might decide to reject a claim of this sort on the ground that the claimant had contributed to the problem by failing to insist on either a written contract or more prompt recompense.

#### *D. Rules for Co-Owners*

The co-ownership of residential property typically commences when a transferor executes a deed that vests title in two or more concurrent owners.<sup>371</sup> Surveys indicate that intimate couples, typically spouses, are the exclusive co-owners of a large majority of the co-owned housing units in the United States.<sup>372</sup> Although a co-ownership relationship, as such, is unlikely to be as multi-stranded as a co-occupant relationship, co-owners inevitably have numerous issues to resolve among themselves. Serious conflicts among co-owners may arise over whether an occupying co-owner owes rent to a nonoccupying co-owner, under what circumstances a co-owner who has

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369. Cf. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

370. See *supra* text accompanying notes 327-337.

371. Co-ownership interests also can be created by other means, such as inheritance, see *supra* note 162 and accompanying text, the voluntary fractionalization of shares, and adverse possession.

372. These couples typically own either as joint tenants or as tenants by the entirety, forms that confer full ownership on the surviving spouse. See *supra* notes 126-127 and accompanying text.



unilaterally borne the cost of an improvement is entitled to compel the other co-owners to share that expense, the possible limitations on the rights of a single co-owner to initiate a partition action, and other such issues. In the event of litigation among co-owners, a liberal legal system stands ready to apply a complex set of small-bore private law rules to resolve these sorts of issues.<sup>373</sup> Because disputes among co-owners potentially involve significant stakes, individuals about to jointly acquire residential property might be expected to hire attorneys to learn about the default legal rules and to tailor a written agreement that modifies some of them.<sup>374</sup>

There appear to have been no surveys of how frequently co-owners, prior to endgame, seek the advice of attorneys or enter into written contracts with one another. Various scraps of evidence, however, strongly suggest that most intimate co-owners strive to manage their midgame affairs without the counsel of lawyers and also without fleshing out their mutual obligations in writing. One team of investigators found that most home co-purchasers receive no legal advice even about whether to take title as joint tenants with a right of survivorship or in some other form.<sup>375</sup> Evelyn Lewis, the author of one of the most searching studies of co-ownership, asserts that written agreements among co-owners are unusual.<sup>376</sup> Two leading legal publishers each offer no more than a few legal forms to govern co-owner relations, in sharp contrast, for example, to the hundreds of pages of forms they each offer to govern landlord-tenant relations.<sup>377</sup> Midgame litigation between individual co-owners of residential real estate appears to be rare. In almost 90% of a sample of reported judicial decisions on co-owner disputes, the co-owners had turned to

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373. See STOEBOCK & WHITMAN, *supra* note 40, §§ 5.7-.13, at 201-24.

374. Although most of these legal rules are defaults, some co-owner exit rights are immutable. See *supra* text accompanying notes 40-42.

375. Michael Braunstein & Hazel Genn, *Odd Man Out: Preliminary Findings Concerning the Diminishing Role of Lawyers in the Home-Buying Process*, 52 OHIO ST. L.J. 469, 476 n.30 (1991) (reporting that 58% of surveyed homebuyers had not been asked by any intermediary who had helped them close the transaction whether they wanted to hold title as joint tenants or in some other form).

376. Lewis, *supra* note 127, at 409 (“[T]he contractual aspects of the [co-ownership] relationship are rarely formalized by written agreement.”).

377. Compare the relative brevity of 7 AM. JUR. LEGAL FORMS 2D *Cotenancy and Joint Ownership* § 75:1-:49 (2006), and 14 *id.* *Partition* §§ 193:54-:56, with 11, 11A & 11B *id.* *Leases of Real Property* §§ 161:1-:1275, nearly three full volumes on leases of real property. Similarly, compare the sparseness of 5A NICHOLS CYCLOPEDIA OF LEGAL FORMS ANNOTATED § 5.2834-.2836 (rev. ed. 2001), discussing joint tenants and tenants in common, and 6D *id.* § 6.7535 (rev. ed. 1992), discussing partition, with 5B *id.* pts. 1 & 2 (rev. ed. 2002), two entire books on leases.

the courts only after they had entered endgame—for example, after they had become embroiled in a partition, divorce, or probate action.<sup>378</sup>

Like intimate co-occupants, most intimate co-owners correctly anticipate that they will be able to use gift exchange and discrete oral contracts to resolve any issues that they may confront while their relationship remains healthy.<sup>379</sup> During midgame, most intimate co-ownership relationships thus are structured not in the shadow of the small-bore private law of co-ownership, but beyond that shadow.<sup>380</sup>

### *E. Rules To Govern the Landlord-Tenant Relationship*

By consorting with intimates, most participants keep their owner-occupant relationships sunny. Roughly one-fourth of these relationships in the United States, however, involve parties at arm's length.<sup>381</sup> Of all household relationships, these non-intimate leaseholds pose the greatest risks of

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378. In both midgame and endgame a co-owner is entitled to petition for a judicial accounting. See, e.g., STOEUCK & WHITMAN, *supra* note 40, § 5.9, at 209. To obtain evidence of when co-owners actually initiate accounting actions against one another, on April 20, 2006, an examination was made of the 100 most recent reported state appellate cases involving real estate and bearing West Keycite 373k37 (“Tenancy in Common; Mutual Rights, Duties, and Liabilities of Cotenants; Accounting”). Of these 100, forty-two cases were excluded because they involved either a corporate entity as a named party, a dispute involving the ownership of a mineral interest, or a title dispute (implying that the parties did not even know whether they were involved in a “game” at all). In at least fifty-one of the remaining fifty-eight cases (88%), the appellate decision indicated that the plaintiff had initiated the accounting action in endgame, most commonly incident to a partition action. *But cf.* Swartzbaugh v. Sampson, 54 P.2d 73 (Cal. Ct. App. 1936) (involving a midgame action by a wife against her husband to cancel the husband’s lease of his interest in real estate that the couple jointly owned and occupied).

379. When the members of a group of co-owners are either numerous or non-intimate, however, they indeed may hire an attorney to draft written documents formalizing portions of their relationship. For example, multiple absentee owners of a large residential complex are likely to be organized as a corporation, partnership, or trust. See *supra* text accompanying note 132. In England, a trust is the standard institution for the governance of co-owned property, even among intimates. See Dagan & Heller, *supra* note 1, at 620 n.282.

380. Even in endgame, co-owners are relatively unlikely to become embroiled in litigation. While there are many contemporary treatises exclusively on landlord-tenant law, see *infra* note 388, treatises on concurrent ownership are few and mostly dated, see, e.g., A.C. FREEMAN, COTENANCY AND PARTITION (San Francisco, Bancroft-Whitney 1886).

381. See *supra* note 142 and accompanying text.

estrangement and are the ones most likely to give rise to both written contracts and litigation in endgame.<sup>382</sup>

1. *When Landlords Also Are Occupants*

By becoming homeowners, occupants eliminate the need to deal with a distant landlord. In many owner-occupied households, however, there also are non-owning occupants—commonly children or other relatives of one or more of the owners. In these instances, relations between owners and non-owning occupants are likely to be warm. An owner is not likely to charge a co-occupying relative rent, and is even less likely to insist on the execution of a written lease. Parents exasperated with the sloth of a stay-at-home adult child, however, ultimately may decide to charge him rent and formally assign him domestic duties. A wake-up call of this sort teaches the child that, among competent adults, a flow of gifts cannot go entirely unreciprocated. Elderly live-in relatives, by contrast, are likely to understand the implicit duty to return gifts and therefore, when able, are apt to contribute money and services to support ongoing household operations.<sup>383</sup> Intimates, however, would be unlikely to refer to a senior's contributions as "rent," an alienating term that connotes social distance.<sup>384</sup>

An owner-occupied household also may include occupants—such as boarders and live-in domestic workers—who are not relatives of the owners. According to Census data, roughly three-quarters of unrelated adults of this sort do not pay rent to the owners with whom they live.<sup>385</sup> Instead, they may help maintain their welcome by providing money for selected household operations or by rendering valuable domestic services, such as childcare or yard

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382. Individuals who think of themselves as voluntary members of an in-group are especially likely to trust one another. See Blair & Stout, *supra* note 69, at 1770-72 and sources cited therein. Of all the principal relationships in a household setting, that between a tenant and a landlord at arm's length is the one least likely to give rise to this shared perception.

383. See George Hemmens & Charles Hoch, *Shared Housing in Low Income Households*, in UNDER ONE ROOF: ISSUES AND INNOVATIONS IN SHARED HOUSING 17, 23-25 (George C. Hemmens et al. eds., 1996) (reporting that in Chicago in the 1980s, adults residing in low-income households, especially ones lacking a conjugal unit, tended to contribute both money and services to the household economy).

384. See *id.* at 23 (stating that kinfolk tended to be taken in "at nominal or no rent").

385. The American Housing Survey defines a "lodger" as someone who pays rent to another household occupant. AMERICAN HOUSING SURVEY: 1999, *supra* note 90, at A-17. In 1999, the heads of owner-occupied households reported the presence of 2.2 million unrelated adults and 0.6 million lodgers. *Id.* at 64.

work.<sup>386</sup> An owner may prefer to have a written contract with a nonrelative who is socially distant—for example, an au pair brought in from abroad. Because contracts are inevitably incomplete, however, even under those circumstances a formal arrangement may not be worth the candle.<sup>387</sup>

## 2. *When Landlords Are Not Occupants*

Arms-length residential tenancies can give rise to a host of substantive and procedural disputes that are complex enough and litigated frequently enough to have inspired the authorship of numerous legal treatises.<sup>388</sup> Especially in rural areas and small cities, however, landlords' and tenants' interests in maintaining good local reputations can give rise to a surprisingly high level of trust.<sup>389</sup> For example, in the less expensive segments of the rental housing market, a lease between a tenant and an absentee landlord traditionally has been oral.<sup>390</sup> Purveyors of legal forms nevertheless do offer many versions of written residential leases, and many landlords prefer a more formalized

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386. In a household without a married couple, and in a black or Hispanic household, a nonnuclear household occupant is particularly likely to provide monetary support for household operations. See Angel & Tienda, *supra* note 112, at 1379–80.

387. In practice, a firm that specializes in the placement of au pairs is likely to be involved in any contracting between an au pair and the host family. See, e.g., *Oxman v. Amoroso*, 659 N.Y.S.2d 963 (Yonkers City Ct. 1997).

388. General treatises include MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES* (Patrick A. Randolph Jr. ed., 5th rev. ed. 2006), and ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* (1980). There also are state-specific treatises, especially in jurisdictions with a tradition of rent control. See, e.g., ROBERT F. DOLAN, *RASCH'S LANDLORD & TENANT* (4th ed. 1998) (New York); STUART J. FABER, *HANDBOOK OF LANDLORD-TENANT LAW* (1978) (California); RAYMOND I. KORONA, *LANDLORD AND TENANT LAW* (5th ed. 2001) (New Jersey).

389. Some landlords prefer to rent to tenants who can provide positive references from former landlords, a practice that helps deter tenant opportunism in all settings.

390. In the 1970s in Brown County, Wisconsin, only 10–12% of residential tenants had a written lease at the outset of their tenure, and only 30% of landlords reported that they required a security deposit. RAND CORP., *supra* note 139, at 53, 55. Written residential leases undoubtedly have become more common in some jurisdictions. See Steven M. Shepard, *Withholding Rent in Connecticut* 71 n.259 (Dec. 21, 2005) (unpublished manuscript, on file with author) (citing interviews with landlord-tenant law specialists about the nature of New Haven leases). In the case of poor tenants, the increasing formality of apartment leases likely is partly attributable to the maturation of legal services programs and to the advent of the Section 8 housing voucher program, which requires a participating landlord to employ a one-year written lease. See 42 U.S.C.A. § 1437f(d)(1)(B)(i) (West 2003).

relationship that includes, for example, a security deposit.<sup>391</sup> Written leases are likely to be especially common when stakes are high (e.g., the dwelling unit is relatively expensive) and when the parties anticipate remaining socially distant (e.g., the landlord is a corporation or other institution).

Once a tenant and absentee landlord reach endgame, they are unlikely to have any compunction against turning to attorneys and courts to help resolve their disputes. In midgame, however, even an absentee landlord and a tenant gain by being able to resolve their differences in a more informal fashion. By applying lease provisions and ambient norms to resolve midgame disputes, they can save the expense of learning and applying small-bore landlord-tenant law.<sup>392</sup>

Rent controls and project-based housing subsidy programs spawn some of the most legalized of midgame relationships between landlords and tenants. Even if they have come to hate one another, a landlord and tenant governed by one of these programs have difficulty severing their relationship. Special legal provisions sharply limit a landlord's power to end a tenant's stay, and a disgruntled tenant may not want to leave if that would entail losing an attractively priced abode. Anticipating the risk of especially frosty midgame relations in these contexts, a landlord is likely to insist in advance on a detailed lease. When exasperated by an unresponsive landlord, a tenant is likely to prefer to hire an attorney (or, if eligible, to seek free help from a legal services office) rather than to exit and give up the subsidy. Thus in New York City, where rent controls have a long history and subsidized housing projects are especially prevalent, residential landlords and tenants are uncommonly likely to turn to lawyers and courts to resolve spats arising out of ongoing leases.<sup>393</sup>

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391. See, e.g., 11 AM. JUR. LEGAL FORMS 2D *Leases of Real Property* §§ 161:34-:42, :49 (2006 rev.) (offering ten lengthy form leases for residential property).

392. See ELLICKSON, *supra* note 275, at 275-79.

393. Since 1984, the New York State Division of Housing and Community Renewal (DHCR) has administered the rent control and rent stabilization programs in New York City (and a few other localities). These programs generate much litigation. On June 21, 2006, a search of the Westlaw database of New York cases (ny-cs), using the search terms "dhcr /10 rent & da(aft 1999)," resulted in a list of 292 decisions dated 2000 or thereafter. There also is a special court exclusively devoted to residential landlord-tenant litigation in the city. This court has 50 judges, over 1000 nonjudicial employees, and handles over 350,000 cases per year, making it "one of the busiest courts in the world." N.Y. City Civil Court, Housing Part, <http://www.nycourts.gov/courts/nyc/housing/index.shtml> (last visited Oct. 9, 2006). On the perversities of the city's approach, see generally PETER D. SALINS & GERARD C.S. MILDNER, *SCARCITY BY DESIGN: THE LEGACY OF NEW YORK CITY'S HOUSING POLICIES* (1992); and Tammie X. Simmons-Mosley & Stephen Malpezzi, *Household Mobility in New York City's Regulated Rental Housing Market*, 15 J. HOUSING ECON. 38, 40-42 (2006) (reviewing the literature).

## CONCLUSION

Charles Fourier, the early-nineteenth-century French social critic, urged the creation of large planned communities—Phalanxes—whose members would apply “industrial principles” to domestic life. In 1844, George Ripley and the other leaders of the ongoing intentional community of Brook Farm embraced Fourierism and set about constructing a Phalanstery building containing nearly 100 small dwelling rooms and a dining hall capable of seating over 300 persons. Like the other two dozen efforts in the 1840s and 1850s to create Fourierist communities in the United States, the Brook Farm endeavor soon fizzled out.<sup>394</sup> The author of the leading history of Brook Farm puzzlingly attributes its demise to the personal shortcomings of the community’s leaders and financial backers.<sup>395</sup> Brook Farm’s basic problem in fact was a built-in and utterly mundane flaw in the Fourierist conception—the unacceptably high transaction costs, particularly in the absence of a powerful unifying ideology, of coordinating domestic activity within a Phalanstery building.

As this example illustrates, much scholarly work on both conventional and exotic household institutions has been undertheorized. Having striven to bring theory to the topic, I conclude with some thoughts about opportunities for future work. Transaction cost economics and the theory of the firm can enrich the work of demographers, social historians, anthropologists, sociologists, and family law specialists, many of whom have paid too little attention to the roles of owners in the governance of domestic spaces. Conversely, scholars who study the structure of business and governmental organizations can learn from Aristotle’s basic insight that social arrangements that succeed within the household commonly inspire creators of more complex human institutions. According to one estimate, family-controlled enterprises, broadly defined, are responsible for a majority of U.S. business activity conducted *outside the household*.<sup>396</sup> Organizers of business firms, like organizers of households, see

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394. A fire totally destroyed Brook Farm’s Phalanstery prior to the building’s completion. See DELANO, *supra* note 181, at 254–57. No effort ever was made to reconstruct it. Brook Farm, in all its incarnations, lasted from 1841 to 1847. On the Fourierist movement in the United States, see *id.*; and GUARNERI, *supra* note 222.

395. DELANO, *supra* note 181, at 323 (“Fourierism itself was not one of the major causes of Brook Farm’s eventual failure.”); see also *id.* at xiv–xv, 319–24.

396. See Joseph H. Astrachan & Melissa Carey Shanker, *Family Businesses’ Contribution to the U.S. Economy: A Closer Look*, 16 FAM. BUS. REV. 211, 217 (2003) (asserting that family businesses, narrowly defined, accounted for 29% of U.S. GDP in 2000, and, broadly defined, accounted for 64%); see also Hansmann et al., *supra* note 41, at 1357–60, 1365–66 (describing family and household enterprises in ancient Rome and medieval Italy); Pollak, *supra* note 1, at 591–93 (identifying advantages of family-governed firms).

advantages in consorting with intimates and undoubtedly apply to the workplace some of the lessons that they learned at home.

The role of law—especially of background legal principles—in shaping household institutions has been inadequately appreciated. When a traditional society first embraces the basic liberal principles of private property, freedom of exit, and freedom of contract, it transforms its dynamics of household formation. In addition, by establishing the rule of law a society makes it easier for household members to trade with outsiders, a development that reduces the scope of internal household production.

The household is an especially fruitful setting for empirical work on systems of social control within small groups—a topic of interest to, among others, game theorists, sociologists, and legal scholars. How commonly do participants in a household relationship employ tit-for-tat sanctions, pay money to one another, or enter into written contracts? When do co-occupants informally privatize particular spaces within their abodes? How do the founding members of an intentional community raise capital, confer ownership, and make collective decisions?

Finally, study of the household promises to illuminate central positive and normative questions about the role of small-bore private law. Legal centralists assume that private law influences events not only after things go wrong, but also before they do—that is, when people prepare for that possibility. One of my central factual premises, by contrast, has been that most people, wishing to minimize involvement with lawyers, structure their household arrangements beyond the shadow of private law. Some legal commentators, on the other hand, have urged participants in household relationships to enter into more written contracts with one another.<sup>397</sup> In a few domestic situations, this indeed is wise counsel.<sup>398</sup> When the participants are intimates enmeshed in what is likely to be a long-lived relationship, however, formalization usually is a mistake. Attorneys who contribute to the legalization of home relations typically not only waste the fees that their clients pay them, but also debase the quality of life around the hearth.

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397. See, e.g., sources cited *supra* notes 316, 333, 336. But cf. DAHLIA LITHWICK & BRANDT GOLDSTEIN, *ME V. EVERYBODY: ABSURD CONTRACTS FOR AN ABSURD WORLD* (2003) (offering a collection of tongue-in-cheek contracts to govern aspects of intimate relationships).

398. See *supra* text accompanying notes 306–316, 330–337.